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—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
GUARDIAN TRUST COMPANY, *Respondent*.

No. 941.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
CENTRAL IMPROVEMENT COMPANY, *Respondent*.

No. 385

Petition for Certiorari and Brief in Support Thereof.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Petitioner.

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THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

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vs.

CENTRAL IMPROVEMENT COMPANY, *Respondent*.

PETITION FOR CERTIORARI.

Now comes The Kansas City Southern Railway Company, herein called the Southern Company, and respectfully petitions this court to grant a writ of *certiorari* to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case therein pending, being separate appeals numbered 3489 and 3490 in the same case, wherein the petitioner is appellee, and the Guardian Trust Company and the Central Improvement Company are appellants in said appeals respectively, a copy of the record being presented herewith.

The main question involved therein is whether, in a reorganization of several allied railway companies, participated in by both bondholders and stockholders, the respondent, Guardian

Trust Company, which was a stockholder and bondholder in, and creditor of one of the companies involved, could, as an unsecured creditor of one of the old companies, impose a liability for that debt on the new company (the petitioner), based upon the alleged fraudulent character of the reorganization plan, under the rule of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S., 482, *in the face of the following conceded facts*:

(a) The Trust Company, as bondholder and stockholder, had previously exchanged its securities, *under the reorganization plan and agreement*, (its stock alone, amounting to $407,474.00, would have been a total loss but for the plan) and received in lieu thereof and still retains $865,927.70 par value of the stocks and $614,981.50 par value of the bonds of the new company.

(b) The Trust Company had executed a covenant at the time it became a party to the reorganization plan and as a part of the reorganization agreement, in consideration of the stocks and bonds of the new company, by which it *agreed* not to hold the new company for the debt of the old companies, to the following effect:

> No right is conferred nor any trust, liability, or obligation is created by this agreement or the plan, or is assumed hereunder by or for any new company, in favor of any creditor or any holder of any claim whatsoever against the said companies (including the Belt Company), with respect to any moneys paid to or received by the Committee, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any other matter or thing.

(c) The petitioner purchased the properties involved under decrees of foreclosure and sale rendered by the Circuit Court of the United States which purported to convey to it the properties free and clear of claims or liens, but without prejudice to the rights of the Trust Company in certain particulars.

(d) The property of the Belt Company (which was the debtor of the Trust Company), was encumbered with a mortgage of $1,000,000, its property was sold to the petitioner at foreclosure sale for that amount, and the proceeds of the sale were paid in

and distributed under the order of the court. The "fair market value" of the property of the Belt Company at the time of the foreclosure sale and during the reorganization was litigated in the case at bar, and the master found (this finding is not conceded, but it is established by the record, pp. 990, 991) *that the value of its property at that time did not exceed the mortgage indebtedness.* The Trust Company did not except to this finding, or assign it as error.

The Circuit Court of Appeals (reversing the lower court) holds that, under these circumstances, the Trust Company may hold the Southern Company for the debt of the Belt Company and is, therefore, entitled to judgment against the Southern Company in an amount exceeding $700,000 on that account.

Thereupon, petitioner respectfully shows:

I.

Cause pending below and sought to be certified.

(1) *The bill of the Cambria Company.* In September, 1900, the Cambria Company filed a creditor's bill (Rec., 5-34), based on a judgment rendered in its favor by the Federal Circuit Court for the Western District of Missouri, against the Belt Company, the issue of execution and a return of *non est*, against the Trust Company and others, the general purpose being to secure an accounting between the Belt Company and the Trust Company, and to subject certain collateral held by the Trust Company to the payment of the complainant's judgment if, as a result of the accounting, the alleged indebtedness should be canceled and the collateral should be released. The finding and decree below were against the complainant on the issues made by the bill, and no appeal was taken.

2. *The ancillary bill of the Belt Company and its receivers.* The Belt Company, and its receivers, by direction of the court (Rec., 35), and by stipulation (Rec., 1034) which provided that there should be an accounting between the Belt Company and the Trust Company, filed an ancillary bill and amendments (Rec.,

116, 237, 456) against the Trust Company and others, seeking an accounting as between the Belt Company and the Trust Company and the release of the collateral held by the latter. The decree below (Rec., 1050) eliminated three items from the account, and gave judgment (Rec., 1052) in favor of the Trust Company and against the Belt Company in the total sum of $639,658.86. No appeal was taken by the Belt Company or its receivers.

3. *The intervening petition of the Southern Company.* In February, 1905, it was stipulated (Rec., 191) that the Southern Company should be made a party to the Cambria case either as joint complainant or by bill of intervention, as it might elect, and that the testimony theretofore or thereafter taken should be considered in support of the issues made. Its intervening petition was immediately filed (Rec., 195) in which it alleged that it was the purchaser at foreclosure sales under foreclosure decrees of the United States Circuit Court of the properties of the Belt Company, the Gulf Company, and the Air Line; that the mortgages executed by those companies upon their properties respectively contained after-acquired property clauses, and that the liens of said mortgages attached in equity to the collateral held by the Trust Company as security for the alleged indebtedness of the Belt Company to it; and the Southern Company prayed that the collateral be awarded to it. In particular the Southern Company alleged that certain terminal properties in Kansas City, Missouri, and in Kansas City, Kansas, had been purchased by the Belt Company, Gulf Company, and the Air Line, with moneys contributed by those companies respectively for terminals and rights-of-way needed by them, the legal title being taken, for convenience, in the name of the Central Company which, it was charged, had been reorganized solely for the purpose of conveniently holding the legal title to such properties. The Southern Company averred that the equitable lien of the mortgages of the Belt Company, the Gulf Company, and the Air Line attached to said properties at the times of their purchase and acquisition, and that the equitable title thereto had passed to it under the foreclosure sale, and it demanded either a conveyance of the properties to it, or a return to it of the capital stock of the Central Company which was held by the Trust Company as a part of its collateral security.

4. *The answer of the Trust Company to the intervening petition of the Southern Company.* The main controversy in this case arises over the Trust Company's answer, which was filed in March, 1905, (Rec., 218), in which it was alleged (Rec., 233) that a reorganization plan, contemplating the reorganization of the Gulf Company and its allied companies had been prepared and promulgated by a reorganization committee; that such plan contemplated the deposit with the committee of the stocks and bonds of the companies involved in the reorganization, and the organization of a new company, to-wit, the Southern Company, which should issue its stocks and bonds in exchange for the stocks and bonds of the old companies in certain specified proportions; that the exchange of stocks resulted in the stockholders of the Belt Company securing a large amount of the stock of the Southern Company which was alleged to be more valuable than the Trust Company's claim against the Belt Company, and it was averred that said scheme legally implied the payment by the Southern Company of all of the Trust Company's claims against the Belt Company.

5. *The Master's report and decree.* The Master's report was filed in May, 1910, (Rec., 659-1033). In addition to the finding upon the bill of the Cambria Company and upon the ancillary bill of the Belt Company and its receivers, above referred to, the Master found (Rec., 1031-1032) that the Southern Company was entitled to a conveyance to it of the lands of the Central Company; and that the Southern Company did not, by reason of the reorganization plan, or otherwise, assume or agree to pay or become liable for the indebtedness of the Belt Company to the Trust Company. The Trust Company filed exceptions to the master's report. It excepted to the *inclusion* in the report of any finding on the issue of the liability of the Southern Company, but did not except to the *correctness* of the finding itself.

The final decree was entered on June 25, 1910, (Rec., 1049), confirming the master's report, dismissing the bill of the Cambria Company, rendering a judgment in favor of the Trust Company against the Belt Company in the sum of $639,658.86, and finding that the Southern Company did not assume or agree to pay the

indebtedness of the Belt Company, and directing the Central Company to convey certain specified lands to the Southern Company.

6. *The appeal to the Circuit Court of Appeals.* The Trust Company was allowed an appeal, without supersedeas, to the Circuit Court of Appeals for the Eighth Circuit on August 10, 1910. An appeal was allowed on behalf of the Central Company on August 10, 1910, but on October 8, 1910, the orders allowing the appeal of the Central Company, and approving its supersedeas bond, were set aside and vacated by the Circuit Court upon the ground that counsel purporting to represent the Central Company were not, in fact, authorized to appear for or represent it (Rec., 1081). The record on appeal contained the pleadings and the report of the master. It did not contain any of the evidence.

7. *Proceedings in the Circuit Court of Appeals.* The case was argued before the Court of Appeals, composed of a circuit judge and two district judges, in May, 1911. Three questions only were raised by the assignments of error: first, that the issue of the liability of the Southern Company to the Belt Company was not in the case and should not be decided; secondly, that the decree was erroneous in requiring the Central Company to convey the specified property to the Southern Company; and, thirdly, that the court erred in requiring one-third of the costs to be paid by the Trust Company. There was no assignment of error directed to the *correctness* of finding on the liability issue, assuming that issue to be in the case.

In June, 1911, the judges of the Circuit Court of Appeals advised counsel that they thought the liability issue was one of the issues made by the pleadings, and asked counsel to brief that question so that the court might determine whether it could consider the liability issue, under the state of the record, and if so, whether there was a plain error in that regard which the court could notice of its own motion. Briefs were accordingly filed on December 1, 1911, and the case was submitted thereon, oral argument being denied.

On October 22, 1912, the Court of Appeals handed down the opinion reported at 201 Fed., 811, revising the decree of the cir-

cuit court and directing the lower court to enter a specific decree in favor of the Trust Company and against the Southern Company for some $700,000. In January, 1913, a re-argument was had, and on December 2, 1913, a second opinion was handed down, adhering to the former conclusions of the court, a copy of the opinion being annexed to the brief in support of this application.

II.

Reasons for granting this petition.

1. *Grave and serious questions affecting the rights of the petitioner are involved.*

An enormous judgment in favor of the Trust Company for over $700,000 is imposed upon the Southern Company for the alleged reason that the reorganization plan, under which the latter acquired the Belt property, was "fraudulent" as against *assenting* creditors, although the Trust Company had been *benefited* by the plan to the extent of $1,480,909.20 in the exchange of its old securities (a large part of which, but for the plan, would have been a total loss) for the securities of the Southern Company, which it still retains. The Trust Company is permitted to claim *under* and *against* the same instrument.

This court, in the *Boyd* case, referring to a similar reorganization, said that "the transaction would be *binding between the parties,*" and was only invalid as to *"non-assenting* creditors," yet the Circuit Court of Appeals holds that the plan was sufficiently *valid* to enable the Trust Company to reap enormous benefits from it, but that it was sufficiently *fraudulent,* as a conveyance in fraud of creditors, to permit the Trust Company, which was a *consenting* creditor, to recover of the Southern Company its debt against the Belt Company. The doctrines of equitable election, ratification or estoppel, it is said, have *no application.* In other words, although the Trust Company, by becoming a party to the plan, *consented* to the diversion of assets to stockholders which, it is said, should have gone to creditors, yet it is

permitted to *base its action* against the Southern Company on the doing of the *very thing* to which it assented.

A rule so revolutionary, and so in conflict with settled principles and with decisions of this court should not, it is respectfully submitted, be given a fixed place in our jurisprudence until it has received the approval, after mature consideration, of the highest court in the land.

2. *Effect is denied to the solemn covenant of the Trust Company that it would not hold the Southern Company for the debt of the Belt Company.*

The substance of the covenant of the Trust Company (Rec., 953), which was supported by ample consideration, is quoted *supra*.

The obvious purpose of this covenant was to put security holders to their *election*. If they accepted the benefits of the plan they thereby waived the right to hold the new company liable for any debts of the old companies. The purpose was a lawful one. No rule of public policy is violated. The Trust Company, for an exceedingly valuable consideration moving to itself, and after balancing the advantages and disadvantages, accepted the plan, determining that its interests would best be served by accepting its benefits and by waiving any claim it might have to hold the new company for the debt of the old one.

The Court of Appeals holds that the Trust Company may *ignore* its covenant and enforce a trust, or liability or obligation of the new company for the debts of the old company, notwithstanding its agreement that it would not do so.

3. *The decision of the Circuit Court of Appeals leads to alarming and disastrous consequences.*

(a) An equity "of at least $475,000.00" is *created* in the property of the Belt Company where *none* existed before. The bonded indebtedness of the Belt Company was $1,000,000 (Rec., 218), which was the amount of the purchase price paid by the Southern Company at the foreclosure sale. The master found that, at the time of the foreclosure sale in December, 1901, after

the reorganization was complete, all the properties involved then being operated together in one interest and as one system, its value (Rec. 990-991), *did not exceed the mortgage indebtedness.* Furthermore, the floating indebtedness of the Belt Company *alone* at that time was $900,000 (Rec. 973).

By what just and logical process of reasoning can it be said that the Belt Company, under these circumstances, possessed an equity which could be subjected to the payment of a judgment in the sum of $700,000 to an unsecured creditor? If the Belt Company had no equity out of which the Trust Company's claim could be satisfied, how can the Southern Company be held?

It is not, we submit, any satisfactory answer to say that $4,750,000 par value of stock of the *Southern Company* had been previously issued to old stockholders of the Belt Company. That stock, prior to the foreclosure sale of the Belt Company, represented the physical property of the Gulf Company and its allied compaines, *other than the Belt Company,* and only represented the *stocks and bonds* of the Belt Company (which property was only 3 1/3 per cent of the whole reorganization), and they could not have been worth more than the Belt Company's physical property, which the master valued at $1,000,000 at the time of its foreclosure sale.

(b) What would have been the result if the rule of the *Boyd* case, providing for a "fair offer" to unsecured creditors, had been followed at the time of this reorganization, and there had been issued to the Trust Companies "preferred stock on equitable terms," which we will assume to mean dollar for dollar, taking the indebtedness (if it could have been ascertained at that time) and the stock at par, which is most favorable to the Trust Company, in view of the value of the property of the Belt Company and the amount of its secured and unsecured indebtedness. The Trust Company would have received $360,000 par value (its debt without interest) of preferred stock of the Southern Company, the average market value of which, during the year 1900 was $33.75 per share, making an aggregate value of $124,000. Add all the dividends that have been paid on the preferred

stock (at four per cent during the past six years only) and interest thereon, and the result to date would be approximately $225,000.

The present market value of the preferred stock is $57.50 and on that basis the value of the Trust Company's holdings with dividends and interest thereon to date would be approximately $300,000.

The effect of the decision of the Court of Appeals is to award the Trust Company *over* $400,000 more than it would have realized to date if it had received "preferred stock on equitable terms" as a creditor, under the ruling in the *Boyd* case, which this court has said is the measure of its equitable rights.

The difference is so enormous as to at least suggest the necessity of some further consideration of the reasoning by which the Court of Appeals has reached its conclusion.

If the Southern Company is to be held liable at all (which we strenuously deny) should not the court *now* prescribe equitable terms, as of the date of the reorganization, instead of enforcing a judgment for the full amount with the accumulated interest?

A judgment awarding payment in full of the Trust Company's claim and accumulated interest is, we submit, without justification in the absence of proof as to what was the equitable interest of the Trust Company in the reorganized property and without proof of its *pro rata* share therein.

(c) The court of appeals (Opinion, p. 13) reaches the conclusion that the Southern Company paid in value "at least $475,000" for the equitable interest of the stockholders of the Belt Company in its property, and that this amount is available to creditors; and it concludes, therefore, that that interest was worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company.

But the court apparently overlooks the *conceded fact* that the reorganization committee and the Southern Company paid out $1,164,172.56 (Rec. 999) on account of the floating debt of the reorganized companies. There is nothing in the present record to show how much of this was on account of the indebtedness of the *Belt Company*. There is nothing to indicate that the whole

of the $475,000 has not been already paid to creditors. The fact that there was a diversion to stockholders of $475,000 which belonged to creditors, furnishes no guide as to what part of that sum belonged to this particular creditor in the absence of proof of the total debts.

4. *The rulings of the Court of Appeals in two respects are in conflict with rulings of Circuit Courts of Appeal in other circuits, and also with rulings of this court.*

(a) The ruling of the Court of Appeals in respect to the properties of the Central Company (201 Fed. 826), is adhered to without comment in the second opinion (p. 30). The properties involved were purchased with the moneys of the mortgagor companies for rights of way needed by them respectively, the naked legal title being taken in the Central Company, whose stock was held by the mortgagor companies in the proportion in which their moneys went into the properties. The equitable title to the properties was thus in the mortgagor companies. Afterwards, and while the mortgagor companies held the equitable title to the properties themselves and also the corresponding stock of the Central Company, the stock of the Central Company was pledged to the Trust Company, which was trustee in all the mortgages, as collateral for *its* indebtedness. Before this pledge of stock of the Central Company occurred, the after-acquired property clauses of the mortgages of the mortgagor companies had attached in equity to the properties, and the title thereto afterwards passed to the Southern Company as purchaser at the foreclosure sales of the properties of the mortgagor companies.

In denying the Southern Company's title to the properties of the Central Company the Court of Appeals is in direct conflict with the following decisions of Courts of Appeal of other circuits.

Guranty Trust Company v. *Atlantic R. R. Co.*, 138 Fed., 517,Third Circuit;

New England Water Works Company v. *Farmers' Loan and Trust Company*, 136 Fed., 521, Seventh Circuit.

And the Court of Appeals is also in conflict with the ruling of this court in the following cases:

> *Wade* v. *Railway Company,* 149 U. S. 327, 341;
> *Central Trust Company* v. *Kneeland,* 138 U. S. 414;
> *McGourkey* v. *Toledo Ry. Co.,* 146 U. S. 536, 566.

(b) The Trust Company's exceptions to the report of the master (Rec. 1038) were that:

> The master, in his report should have *omitted reference to* or *recommendation concerning* the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons.

The grounds specifically assigned were that that issue was *not in the case* for various reasons, but it is nowhere stated that the issue had been decided incorrectly. The assignments of error in the Court of Appeals followed the foregoing exception, the *deliberate purpose* of the Trust Company in its exceptions to the master's report, and in its assignments of error in the Court of Appeals, being to *avoid a decision* in this proceeding upon its merits of the question of the liability of the Southern Company for the floating indebtedness of the Belt Company.

The Court of Appeals holds that under these circumstances it may consider and pass upon this question of liability, and it did consider and pass upon it, notwithstanding the fact that the *correctness* of the master's conclusion that the Southern Company was not liable for the floating debt of the Belt Company went unchallenged before the master and before the circuit court.

The conclusion of the Court of Appeals in this respect is in conflict with the following decisions of the Courts of Appeal of other circuits:

> *Provident Life and Trust Co.* v. *Camber Ry. Co.,* 177 Fed., 854, 859, Third Circuit;
>
> *City of New Orleans* v. *Fisher,* 91 Fed., 574, Fifth Circuit.

And the Court of Appeals is also in conflict with the following decisions of this court:

Burns v. *Rosenstein*, 135 U. S. 449;
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Topliff v. *Topliff*, 145 U. S. 156;
McMicken v. *Perrin*, 18 How. 587;
Medsker v. *Bonebreak*, 108 U. S. 66, 72.

The question is important and material for the reason that exceptions to the report of the master (Rec. 1049) were filed by the Belt Company upon the issue of debt or no debt as between the Trust Company and the Belt Company. These exceptions were overruled, but the Belt Company did not appeal, for the reason that the Trust Company, in its exceptions and in its appeal, did not question the correctness of the finding of the master and the decree of the lower court, to the effect that the Southern Company was *not liable* for the indebtedness of the Belt Company. It was not until after the Belt Company had *lost* its right to an appeal upon the question of the existence or amount of the indebtedness between the Belt Company and the Trust Company that the Court of Appeals decided that it would determine and pass upon the *correctness* of the finding of the master and decree of the lower court upon the liability issue.

5. *Grave and serious questions affecting generally the reorganization of insolvent quasi-public corporations are involved.*

In the Eight Judicial Circuit Court, where the rule of the Court of Appeals is controlling, there are, at the present moment, five railway companies in the hands of receivers appointed by the Federal Court, their aggregate outstanding stock and bond issue being as follows: (Poor's Manual 1913 as to all except the last named company):

St. Louis & San Francisco R. R. Co.	$381,765,462.31
Wabash Railroad Co.	198,481,575.89
Kansas City, Mexico & Orient Ry. Co.	49,538,000.00
Missouri, Oklahoma & Gulf Ry. Co.	17,252,463.15
Metropolitan Street Railway Company	33,684,035.44
	$680,721,536.79

These properties are in process of reorganization either actually or prospectively. Their aggregate outstanding *capital stock* issue is $226,441,526.66. The enormous value thus represented by the capital stock must be *destroyed* unless stockholders participate in the reorganization of these properties. Many difficult and vital questions are left unsettled by the *Boyd* case, and their proper determination has been rendered *more difficult* by the decision of the Court of Appeals in this case. Rights will be sacrificed and protracted litigation will result until there can be an authoritative answer given to certain vital and fundamental questions, among which may be mentioned the following:

(a) May a security holder exchange his securities under a plan of reorganization, and having done so, may he afterwards, notwithstanding the doctrine of estoppel, election and ratification, and without making restoration, recover from the new company for the debts of the old one, for the sole reason that stockholders are given an interest in the new company?

(b) Is it competent for a security holder who accepts the plan and exchanges his old securities for new ones to enter into a valid covenant to waive the assertion of any and all other claims against the new company by reason of his dealings with the old company?

(c) If a court shall hold, in some subsequent proceeding, that the terms offered to a non-assenting creditor fell short of being "equitable," will the court prescribe and enforce terms which it finds should have been offered, or will the creditor be entitled to enforce a money judgment against the new company for the face of his claim and accumulated interest? Can the reorganization committee invoke the judgment of some court to determine what will constitute "fair terms," or must it act at its peril?

(d) If the existence of a creditor be unknown at the time, and he subsequently appears and brings suit against the new company, or if his debt is disputed at the time, but is afterwards established, will the court permit the new company to offer the creditor such equitable terms as would have constituted a "fair offer" at the time of the reorganization, or shall his debt and accumulated interest be paid?

(e) May a bondholder decline to come into a reorganization

in which stockholders receive any benefit, accept his distributive share of the proceeds of the foreclosure sale, credit the same upon his bond and recover the balance against the new company, realizing both principal and interest in full, thus making it impossible to induce bondholders to come into any reorganization?

(f) What rule is to govern the "issuance on equitable terms, of income bonds or preferred stock" to non-assenting creditors? Should preferred stock or income bonds at par equal the face of the creditor's debt? If not, how should the proportion or ratio of stock or bonds to debt, as well as the relative value of securities and debt, be determined?

(g) If stockholders are assessed as a condition to participation in the plan, may creditors also be assessed in a similar manner as a condition to the issuance to them of income bonds or preferred stock? Will creditors be denied relief, as stockholders are, if they fail to pay their assessment?

(h) If in an "adversary proceeding" it is determined that the valid mortgage indebtedness of the debtor equals or exceeds the fair value of the debtor's property so that there is, in fact, no equity out of which the debt can be satisfied, will the new company, nevertheless, be required to satisfy the debt if it issues its stock in exchange for the stock of the old company?

These and other vital questions are involved, directly or indirectly, in this case, and their proper and prompt determination is of immense importance to those charged with the duty of reorganizing insolvent railway properties who, on the one hand, should not unnecessarily sacrifice the interests of stockholders, and, on the other hand, should give due consideration to the protection of the rights of creditors.

6. A brief in support hereof is attached hereto, reference to which is made as fully as if incorporated herein.

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II.

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V.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain 28

VI.

A resulting trust was created in favor of the Railway Companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company 36

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—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

GUARDIAN TRUST COMPANY, *Respondent*.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

CENTRAL IMPROVEMENT COMPANY, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

An outline of the controlling facts:

(a) Receivers were appointed for the Gulf Company in April, 1899 (Rec. 956) in foreclosure proceedings. Receivers were appointed for the Belt Company and the other allied terminal companies in September, 1900 (Rec. 956). The names of the companies involved in the reorganization and the amount of their outstanding bond issues are as follows (the property of the Belt Company being 3 1/3 per cent of the total):

Gulf Company	$24,000,000
Belt Company	1,000,000
Union Company	2,000,000
Consolidated Company	750,000
Air Line	300,000
Dock Company	1,635,000
Total	$29,685,000

(b) The modified plan of reorganization under which the reorganization took place was dated November 7, 1899 (Rec. 943-956). The property of the Gulf Company was foreclosed and sold to the Southern Company and possession taken April 1, 1900. (Rec. 956). The property of the Belt Company and its allied terminal companies were foreclosed and sold to the Southern Company on December 31, 1901 (Rec. 956).

(c) The reorganization plan provided for the issue by the Southern Company of $30,000,000 par value of first mortgage bonds, $21,000,000 par value of preferred stock, and $30,000,000 par value of common stock, to be disposed of as follows: (Rec. 945-950)

BONDS.

For exchange for old securities	$23,197,500	
For cash requirements	3,000,000	
For future requirements	3,802,500	
Total		$30,000,000

PREFERRED STOCK.

For exchange for old securities	$17,417,500	
For cash requirements	3,000,000	
Unappropriated balance	582,500	
Total		$21,000,000

COMMON STOCK.

For exchange for old securities	$29,561,250	
Unappropriated balance	438,750	
Total		$30,000,000

(d) Prior to the reorganization the Trust Company owned the following old securities, par value (Rec. 1008):

Union Terminal bonds	$ 410,000.00
Air Line bonds	42,000.00
Dock Company bonds	325,000.00
Gulf Company bonds	642.00
Gulf Company stock	1,327.00
Belt Company stock	76,972.00
Dock Company stock	438,900.00
	$1,294,841.00

On July 26, 1900, the Trust Company, in accordance with the provisions of the plan of reorganization and the agreement annexed to it, received the following bonds and stocks, par value, of the Southern Company in exchange for its old securities (Rec. 1008):

Bonds	$ 614,981.50
Preferred stock	295,196.70
Common stock	570,731.00
	$1,480,909.20

The Trust Company was one of the depositaries under the reorganization plan, receiving $8,847.72 as compensation for its services in that behalf (Rec. 1006); it co-operated with the Reorganization Committee and used its influence by correspondence and otherwise to induce other bondholders and stockholders to deposit their securities with the Committee, (Rec. 1010). The master says (Rec. 1010):

> The respondent was well acquainted with the purpose of the reorganization scheme, and with such knowledge entered into the same, depositing its own securities, and exchanging them for the new Southern securities, and advising others to make like exchanges.

(e) The depositing stockholders, including the Trust Company, executed the reorganization agreement, which contained, among other things, the following (Rec. 953):

> No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupons, stock, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or by the depositor hereunder, *or with respect to any property acquired by purchase at any foreclosure sale*, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing.

(f) The mortgage indebetedness of the Belt Company was $1,000,000, and was sold at foreclosure sale in December, 1901, for that amount, which the master found (Rec. 990-991), was the fair market value of the property at that time. The floating indebtedness of the Belt Company, in addition to its mortgage indebtedness at the time of the sale, was $900,000 (Rec. 873).

(g) The debt of the Trust Company represents, in the main, the loss sustained by the Belt Company upon an *ultra vires* contract entered into in 1896 between the Belt Company and the Northern Connecting Company, by the terms of which the former agreed to construct the railroad of the latter in consideration of the bonds and stocks of the Connecting Company, and was brought about by the Trust Company, which dominated and controlled both of the contracting companies (Rec. 697-700, 738, 769-770).

I.

The action of the court of appeals is final so that an application for certiorari at this time is not premature.

The Circuit Court of Appeals reversed the decree of the circuit court with specific directions. Every question between the Trust Company and its adversaries has been settled. Even the question of costs is settled so far as the Trust Company is concerned, although the apportionment of costs as between the Cambria Company and the Southern Company is yet to be made. Nothing remains for the district court to do except to enter a decree in accordance with the mandate. The decree, therefore, of the Circuit Court of Appeals was final for the purpose of this application:

Merrill v. *National Bank of Jacksonville*, 172 U. S. 131;
Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492;
Denver v. *New York Trust Co.*, 229 U. S. 123;
Harriman v. *Northern Securities Co.*, 197 U. S. 244.

II.

The Plan of Reorganization is binding upon the Trust Company because it actively participated in the plan and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

(a) The master found (Rec. 1010), that:

> The Trust Company, a depositary in the reorganization plan, co-operated with the committee and used its influence by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the Committee. It was well acquainted with the purposes of the reorganization scheme and with such knowledge entered into the same, depositing its own securities and exchanging them for the new Southern securities, and advising others to make like exchanges.

As heretofore stated, the Trust Company received $1,480,909 par value of the new securities of the Southern Company, under the plan of reorganization. Of this amount, $407,474 par value, represented stock of the Belt Company, the Dock Company, and the Gulf Company, previously owned by the Trust Company, which would have been a total loss to the Trust Company but for the reorganization plan. The par value of the stock of the Southern Company which the Trust Company received and retains is $865,927.70.

No one can deny that the Trust Company, by its participation in the reorganization plan, is held to have *assented to the plan*, and in particular to have *assented to the issue of the stock of the Southern Company in exchange for the stock of the Belt Company and of the Dock Company*, and to the "appropriation of the benefits of the property of the Belt Company, which, in law and in equity, belonged to the unsecured creditors of that company," to use the language of the Court of Appeals. (201 Fed., p. 823).

It is the *exchange* of these securities, by which it is said property or value was diverted from creditors to stockholders, which the Court of Appeals, in its opinion, condemns as amounting to a conveyance in fraud of creditors, ***but it is this exchange to which the Trust Company consented,*** and upon which it placed its stamp of approval. How can it *approve* the transaction sufficiently to receive the benefits therefrom, and then *disapprove* it to the extent necessary to collect its debt? Shall it be permitted to *approbate* and *reprobate* at one and the same time? How can it in one breath approve the action of the Reorganization Committee and of the Southern Company in issuing the securities of the new company in exchange for those of the Belt Company, and at the same time base a cause of action *upon the fact that such exchanges were made?* How can it consistently say:

> We have received new stock for our old securities, and have thereby appropriated to ourselves the benefits of the property of the Belt Company, which in law and in equity belong to the unsecured creditors of that company, but other security holders of the Belt Company were similarly situated and they availed themselves of the benefits of the plan and received an interest in the property of the Belt Company which should have gone to its general creditors, and therefore we demand that the Southern Company shall account to us for the amount of our debt.

(b) *Views of the Court of Appeals on this question.*

The Court of Appeals, in its first opinion (201 Fed. 823) answered our contention upon this question with the statement that,

> The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over $1,000,000, would be paid by the Committee.

In the second opinion a wholly different answer is returned (Opinion 27). There it is said:

> The indispensable elements of an estoppel *in pais* are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth

and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation, and (4) injury to the latter if the truth is permitted to be proved.

And it is further said (Opinion 27):

> The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved.

(c) *The application of the doctrine of "quasi-estoppel" or of estoppel by the acceptance of benefits is fatal to any right of recovery on the part of the Trust Company.*

By the overwhelming weight of authority the acceptance of benefits under the reorganization plan prevents the Trust Company from claiming that the plan or anything done under it, either at *the time* of its execution or subsequently, was in fraud of its rights as a creditor. It is not material whether the rule be called "estoppel" or "quasi-estoppel" or "estoppel by acceptance of benefits" or "equitable election," nor is it *by any means* conclusive, or even important, that the four elements of estoppel *in pais* referred to by the Court of Appeals are absent.

The whole doctrine is concisely stated by Prof. Bigelow, 16 Cyc., 784, as follows:

> The term "quasi-estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel *in pais* and which have the same practical operation as an estoppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.
>
> * * * * * * * *
>
> Where one having the right to accept or reject a transaction takes and retains *benefits* thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by

taking a position inconsistent therewith. Thus it has been repeatedly held that a person by the acceptance of benefits may be *estopped* from questioning the existence, validity, and effect of a contract. So, too, under similar circumstances one may be estopped from questioning the existence, validity, and effect of a deed, mortgage, or bond, or of proceedings under which his property has been taken for a public or quasi-public use. In order to constitute an estoppel, however, the benefit received must be direct, and must have been voluntarily received, and with a knowledge on the part of the person receiving it of his rights.

The rule is well expressed by the Court of Appeals of New York (*Wormser* v. *Metropolitan Street Railway Company*, 76 N. E., 1036), as follows:

> Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *male prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, *has acquired and accepted pecuniary benefits thereunder*. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel [4th Ed.], c. 19), or be denominated merely an *acquiescence* or an *election*, or the *assumption of a position inconsistent with an attack*, makes no essential difference here. The point is that the seeking and acceptance of a substantial *benefit*, which would be unavailable to the stockholders, *except as a result of the acts which he would attack as ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, *after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract.*

The case there under consideration involved the reorganization of the street railway company. The plaintiff brought suit to prevent the carrying out of the reorganization plan on the ground that it was *fraudulent*. It appeared that after suit was brought the plaintiff *availed himself of the plan* by subscribing to the capital stock of the new company and then sold his option or privilege to third persons for over $5,000. He made the subscription under

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IN THE SUPREME COURT OF THE UNITED STATES

Stearns Coal & Lumber Company, *Petitioner,*

vs.

John S. VanWinkle, et al., *Respondents.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner brings this petition to review and reverse a final judgment pronounced against it in the United States Circuit Court of Appeals for the Sixth Circuit, and avers that the cause in which said judgment was pronounced is one of gravity and importance. The case involves the construction of a Kentucky Statute and Code, and the decision is erroneous and out of harmony and uniformity with the decision of the Court of Appeals of Kentucky construing the same Statute and Code, and with the decisions of the United States Court of Appeals of other Circuits, and Courts of last resort of other States on similar statutes, all of which may fully appear from the following:

I. STATEMENT OF THE CASE

The Wayne County-Beaty Oil Well Company was incorporated by an act of the Legislature of Kentucky on January 31st, 1865. Its charter was made to expire by an act of the Legislature of Kentucky on January 31st, 1895. At the time its charter expired, it claimed mineral rights and incidental surface rights in Wayne County, Kentucky, aggregating one thou-

sand acres. It had carried on no mining operations on the land in question. No steps were taken to wind up the corporation. This present suit was begun in December, 1910, in the State Court of Kentucky by several stockholders of the Wayne County-Beaty Oil Well Company, on behalf of themselves and other stockholders to recover the mineral and other rights referred to. In due time, the case was removed to the United States District Court, for the Eastern District of Kentucky, by reason of diversity of citizenship of the parties. The defendant denied that the plaintiffs had any meritorious claim to the interest sued for, and plead adverse possession and the statute of limitation. The case was tried by agreement of the parties to the Court, without a jury, and judgment rendered for plaintiffs. That it may be seen precisely how the question involved arises, we submit herewith as part of this statement of the case a brief statement of the pleadings and proof:

1. The Petition avers, in substance, that in 1895, the Wayne County-Beaty Oil Well Company held the legal title to the mineral and incidental rights in the one thousand acres of land, and that two years after the expiration of the charter, such legal title vested, by operation of law, in the stockholders as tenants in common, and that they were, at the time of the institution of the action, the owners in fee of such mineral and incidental rights, and sought to recover same in an action in ejectment. The defendants traversed the allegations and plead the statute of limitations and adverse possession. At the trial, it was one of the contentions of the defendant that the stockholders of the expired corporation did not hold the legal title to the mineral at the time the action was instituted, and therefore could not recover in ejectment, for the reason that in the Federal Court, in order to recover in ejectment, the plaintiff must be clothed with the legal title to the real estate, and that one joint tenant could not sue for the benefit of another

co-tenant. The trial Court rendered judgment for the plaintiffs therein. The Petitioner excepted to the ruling of the Court, and to the action of the Court in giving said judgment in favor of the plaintiffs. The motion and grounds for a new trial were over-ruled, and from which judgment writ or error was duly prosecuted to the United States Circuit Court of Appeals for the Sixth Circuit.

2. The case was duly heard by the Circuit Court of Appeals, and on April 14th, 1915, the judgment of the District Court was affirmed, with costs. The Court of Appeals held that the Kentucky Statutes, Section No. 561, were applicable. It was of the opinion that two years after the expiration of its charter legal title to the real estate of a corporation vested in the stockholders as tenants in common, and that such stockholders could maintain an action in ejectment, and it was further of the opinion that the Court of Appeals of Kentucky, the highest tribunal in the State, had so construed said section of the Statute. The United States Circuit Court of Appeals was further of the opinion that by Section No. 25 of the Kentucky Code, one joint owner could recover for the benefit of himself and other joint owners in an action in ejectment.

II. KENTUCKY STATUTES

For convenient reference, the Kentucky Statutes and Code involved are printed in the Appendix to this Petition, with numbers as in the Carroll's Edition of said Statutes and Code. Petitioner particularly complains of the holding of the United States Circuit Court of Appeals that the Kentucky Statutes are applicable to and will cause the legal title to the real estate of a corporation to descend and to vest in stockholders two years from the date its charter expires, and vest in such stockholders such legal title as will enable them to maintain an action in ejectment, and of its holding

that one tenant in common may maintain an action in ejectment for the benefit of other tenants in common. The questions involved are important, and the opinion and judgment of the trial court as well as the Court of Appeals are, as we insist, contrary to the construction of the Statutes and Code as construed by the State Courts of Kentucky. Moreover, the construction given to the Kentucky Statutes and Code by the United States Circuit Court of Appeals is contrary to the construction universally given such statutes by the courts, and especially by the decision of the Kentucky Courts construing same.

III. ERRORS ASSIGNED

1. To support the action in ejectment, the plaintiff must be clothed with the legal title to the lands in question, and the stockholders of a dissolved business corporation are the equitable owners of its property and not the legal owners, and the Kentucky Statutes do not operate to vest the legal title to the corporate real estate two years or at all after the expiration of the charter, and the Court of Appeals erred in holding that the plaintiffs were entitled to recover in this action in ejectment upon such title.

2. The tenants in common may sue separately or jointly in ejectment. They are not in any case to be made to join. Therefore, one joint tenant cannot sue for the benefit of all, and it was erroneous for the Circuit Court of Appeals to hold and adjudge that the plaintiffs in the action were entitled to recover for themselves and the benefit of other joint tenants. It has been repeatedly declared by the Courts of Kentucky that tenants in common may sue separately or jointly in ejectment. They are not in any case to be made to join, and one tenant cannot sue for the benefit of all, and it has been repeatedly held and declared by the Courts of Kentucky that the stockholders of a

dissolved corporation are the equitable owners only of its property.

BRIEF AND ARGUMENT

1. The case, therefore, presents for determination the question whether in the State of Kentucky the stockholders of a corporation whose existence has ceased acquire the legal title to the real estate which it then owns. It is not sufficient that they become the equitable owners thereof. It is essential that they become the legal owners. This is so because in the United States Circuit Court no recovery can be had at law on an equitable title. In the case of *Johnson vs. Christian*, 128 U. S. 374, Mr. Justice Lamar said:

> "It is the general rule that in the United States Court, a recovery in ejectment can be had upon the strict legal title only."

This is so whatever may be the rule in the State Court. *Hooper vs. Heimer*, 23 Howard 235. The pivotal question on which the validity of this judgment must turn is whether the stockholders of the expired corporation had legal title to the property and incidental rights of the corporation at the time they instituted this suit.

2. Section No. 561, of the Kentucky Statutes, (See Appendix to this Petition), has remained upon the Statute books of Kentucky for more than a quarter of a century, and it has never received such construction by the Supreme Court of the State as the construction given it by the United States Circuit Court of Appeals. It was enacted as a guide to officers and stockholders of the corporation to follow in the winding up the business of a corporation. The rights of the stockholders of a dissolved corporation in the assets of the corporate property are clearly and fully set forth

in the opinion of the Kentucky Court of Appeals in the case of *Craycraft vs. B. & L. Association*, 117 Ky. 229. In the opinion of the Court it is said:

> "The question of the rights of the stockholders, as among themselves, is one of implied contract. It is that upon the dissolution of a joint enterprise for which they formed a corporation, its assets, after paying its indebtedness will distribute pro rata among the stockholders according to interest. It may be that, if these assets were of a quality capable of an exact partition in the proportion represented by each stockholder's interest, they might be distributed in specie, but that can rarely happen. The only dividends which can ordinarily receive the divisor of share interests is money. The basis of contribution of reckoning liability and of apportioning the final results in money. To liquidate, in law, is to make certain or exact, in units of money, and, in the sense in which the word is used in winding up a corporation, to discharge in lawful money the liabilities so ascertained. Each stockholder is entitled, as a matter of right, and as an incident of his contract to participate in the distribution on that basis. Although the majority in interest and numbers may conceive their interest to be, and although it may be a fact that their interest is, to hold the assets of the corporation for future enhancement of value or for the uses, the dissenting members are not bound to yield their rights to a legal liquidation to the welfare of the others. To make them do so would be compelling them against their wills to enter into a different contract from the one originally made. The doctrine being discussed is thus stated by Cook on Stock and Stockholders (1st Edi), 636: 'When the regular business of a corporation has been brought to a close, the shareholders have a

right to an immediate distribution of the corporate assets. They cannot, therefore, be compelled to accept other property or rights in lieu of cash.'"

In the case of *Castle's Administrator vs. Acrogen Coal Company*, 145 Ky. 595, the Court said:

> "Under Section 561 of the Kentucky Statutes the existence of a domestic corporation after its dissolution is continued for the purpose of enabling it to wind up its affairs and settle its business, and for this purpose it may not only sue but be sued in its corporate name and capacity. Its right to bring actions necessary to enable it to settle up its business and its liability in actions that arose against it before its dissolution, are not lost or destroyed by its dissolution."

In the case of *Neptune Fire Engine and Hose Company vs. Board of Education of Mason County*, 166 Ky. 14, the Court in its opinion said:

> "Under the modern doctrine the real property of a dissolved business corporation does not revert to the grantor, and the personalty does not escheat to the Commonwealth; but both species of property vest in a receiver or other trustee, to be administered by him, for the benefit of the dissolved corporation's creditors and shareholders."

Under Section No. 561 of the Kentucky Statutes it is made the duty of the officers to expeditiously take steps to reduce the assets into condition for distribution.

The United States Circuit Court of Appeals was of the opinion that Section 561 of the Kentucky Statutes had been construed by the Kentucky Court of Appeals to cause the legal title of the property of the Respondents to pass to the stockholders. Such opin-

ion was based solely and alone on the case of the *Ewald Iron Company vs. Commonwealth*, 140 Ky. 692.

That the construction given the case by the Circuit Court of Appeals is clearly erroneous will be seen by an examination of *Ewald vs. City of Louisville*, 168 Ky. 71, which case was affirmed by the Kentucky Court of Appeals, because four judges of said Court could not agree, and only one of the seven judges followed the opinion of the Court in the Ewald Iron Company case, 140 Ky. 692. But the Ewald Iron Company case is not decisive of the question here involved. The facts were that the stockholders in the name of the corporation carried on a trading business after the expiration of the charter of the corporation. The law is well settled that where the corporation is dissolved, the stockholders are not entitled to continue business in the name of the corporation, and if they do so they will be held liable. 6561 Thompson's Corporation, 2nd Edition. And the case was in reference to the citus of personal property belonging to the partners for the purpose of taxation. The Court in the Ewald case said:

> "After the expiration of a reasonable time for the closing up of its business, the title to its property vests in stockholders for the purpose of taxation. The law will not let a man profit by his own wrong.'

Under the statute, Section 4023, it is the duty of the holder of the equitable title to list the property and pay the taxes thereon.

The court did not hold that the stockholders were the legal owners of the property, but the—

"title vested in them for the purpose of taxation."

Under the statute the equitable title is sufficient for the purposes of taxation, and the Court also based

its decision on the ground of estoppel—that is, that the stockholders could not escape taxation by failing to observe their plain statutory duty—

> "to settle up its affairs in business as speedily as possible."

And as estoppel, works against and never in favor of the one in default, one cannot entirely disregard the provisions of a statute and profit thereby.

The construction of the statute given by the Sixth Circuit Court of Appeals is contrary to the construction universally given like statutes by the Courts of other states, and contrary to the construction of like statutes by the Circuit Court of Appeals of other Circuits. A similar statute of Minnesota has been construed by the Circuit Court of Appeals of the United States in *General Electric Company vs. General Improvement Company*, 73 Fed. 386, *Boyd vs. Handkindson*, 92 Fed. 49. And a similar statute in the State of Maine in the case of *Style vs. Lumber Company*, 195 Fed. 319, which case, holding that upon the death of the corporation, the stockholders are the equitable owners of the corporate property and it is the duty of the officers to wind up the business of the corporation and make a distribution of the funds in money.

In a recent case, the Supreme Court of the United States (*Late Corporation of Church vs. U. S.*, 136 U. S. 1), said:

> "When a business corporation, instituted for the purpose of gain, or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders."

One of the first and leading cases holding that the stockholder's interest is equitable is that of *Bacon vs. Robertson*, 18 Howard 480, the court said:

> "And no reason can be given why the dissolution of a corporation, whose capital was contributed by shareholders for a lawful purpose, with the consent of the Legislature, should suspend the operation of these principles, or hinder the effective interference of the Court of Chancery for the preservation of individual rights of property in such case. The withdrawal of the charter—that is, the right to use the corporate name for the purpose of suit before the ordinary tribunals—is such as substantial impediment to the prosecution of the rights of the parties interested as would authorize equitable interposition in their behalf within the doctrine of chancery precedent.
>
> "The acquisition of real property by trading corporations is commonly made upon a bargain and sales for a full consideration.
>
> "It is a case, therefore, in which courts of chancery upon their well settled principles, would aid the party to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.
>
> "The trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the corporation among the creditors and stockholders is his commission."

That the interest of all stockholders in the assets of a dissolved corporation is purely equitable will be seen by the full discussion on the subject by Judge Lurton in the case of *Mason vs. Mining Company*, 66 Fed. 394.

In this opinion, Judge Lurton, speaking for the Circuit Court of Appeals when that bench was composed of Judge Taft, Lurton, and Ricks, employed the following language:

> "At common law, when the corporated life was terminated, by limitation, forfeiture, or otherwise, the corporation ceased to exist in legal contemplation for any purpose whatever, and pending suits abated as in the case of the death of a natural person. *Bank vs. Colby*, 21 Wall. 615. But this common law extinguishment of remedies, and the common law consequences, such as reverter and escheat, were obviated by the courts of equity, which regarded the corporation as a mere trustee, the creditors and stockholders being the cestui que trust. The death of the trustee was not allowed to defeat the trust nor to destroy the rights of the beneficiaries. In business corporations, the capital is contributed by the stockholders, and they are justly entitled to be regarded as the equitable owners of the corporate assets, after the payment of the corporate debts, and their relations inter sese are to be regarded as analogous to the relations of the partners. Equity, therefore, by reason of the flexibility of its remedies, was able to obviate the harsh common law consequences of dissolution, such as reverter and escheat, by administering the assets as a trust. This doctrine, so well known now to students of equity, is elaborately considered in the opinion of Justice Campbell in *Bacon vs. Robertson*, 18 How. 480. In most, if not in all of the States of the Union, statutes of like tenor to that of Michigan have been passed continuing the corporate life pro hac vice, for the purpose of enabling the corporation to wind up its affairs and convert its assets into money for the payment of debts and distribution of surplus among stockholders. These statutes are embodiments of equi-

table doctrines, and afford legal remedy where before there was none."

From this opinion it will be seen, first: That under the statutes such as Section 561 of the Kentucky Statutes, a corporation lives for the purpose of winding up its trust and as such retains the legal title to the property theretofore vested in it; and second, not only where such provisions are not made, but that in all events the title of the stockholders is purely equitable.

It is clear from the above that, conceding defendants in error were shareholders of a corporation at the time of dissolution, their rights to its assets were equitable—not legal—and such a title will not sustain ejectment.

So it is, that the true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the property after dissolution is, in equity, the property of the shareholders charged with the payment of debts, and when not by statutes committed to certain persons a court of equity will gather in the property and satisfy this charge, and divide the residue among the shareholders.

Craycraft vs. Building & Loan Association, 117 Ky. 229.
Weatherly vs. Capital City Water Co., 22 So. 143-144.
State vs. U. S., 136 U. S. 1.
State vs. Bank, 44 N. W., 1000.
Curran vs. State, 15 Howard 304.
Bacon vs. Robertson, 18 How. 480.
O'Connor vs. City, 6 Lea (Tenn.) 732.
State vs. Bank, 5 Baxt. (Tenn.) 106.
Mason vs. Mining Company, 66 Fed. 395.

Where it has been provided by statute that corporations shall after the expiration of their charter continue for the purpose of winding up its affairs, individual stockholders will not be permitted to file a bill for an accounting against a person alleged to be indebted to the dissolved corporation, not even to intervene for this purpose in a suit therefore existing between the corporation and the alleged debtor.

Also "before the affairs of the corporat on can be wound up each creditor and each stockholder must be called in to establish his claim. Coming in, they will have a right to dispute the conflicting claims." *General Elec'ric Company vs. Improvement Company*, 73 Fed. 386.

The United States Circuit Court in the case of *Stout vs. Shoe Company*, 195 Fed. 313, construing the statute said:

> "They provide for the dissolution of a corporation for administering its effects leaving nothing whatever to vest in the shareholders."

If, after dissolution, individual shareholders will not be permitted to file a bill for an accounting, or even to intervene in a proceeding already pending for the purpose, such refusal being upon the grounds that by statute the corporation itself is continued for the purpose of winding up its business—then certainly it cannot be successfully contended that the title to the corporate property actually passes so as to permit the individual stockholder to assert the same, notwithstanding by statute the corporation is continued for the purpose of winding up its business.

If, as assumed by respondents in this case, title vested in the stockholders upon the dissolution of the corporation then the Kentucky Court of Appeals

was wrong in holding that money WAS THE ONLY devisor and that he stockholders could not be compelled to accept property or rights but only cash.

If, as assumed by respondents, that the title vested in the stockholders, then they certainly become tenants in common, and they could not be compelled to accept cash, but only property or rights, and their method of procuring the money would be by partition or sale.

If, as alleged in the petition in this case, that the corporation does not and did not owe any debts at the time of its dissolution, and the stockholders become tenants in common, that is, the legal owners of the land owned by the corporation at the time of its dissolution, then there was no business of the corporation to wind up, and the Legislature of Kentucky ought to have said when it enacted Section 561 of the Kentucky Statutes, that in the event a corporation is dissolved and it has creditors, then it should be the duty of the officers of the corporation to wind up its business but the Legislature did not so state.

3. Tenants in common may sue separately or join in ejectment. They are not in any case to be made to join. Therefore, one joint tenant cannot sue for the benefit of all. The United States Circuit Court of Appeals was of the opinion, and so construed Section No. 25 of the Kentucky Code as to authorize the defendants in error to prosecute and recover the land in question for the benefit of themselves and other tenants. It has been held by the Kentucky Court of Appeals in *Craig vs. Taylor*, 6 B. M. 458, *Lockett vs. Sythe*, 7 Dana 311, and Section 126 of Newman's Pleadings that in actions for the recovery of land which is susceptible of division, co-parties or tenants in common may sue separately or some may sue without the others, and may recover a certain part of the whole, or as to a certain number of

acres which will be their part of the whole according to their title. We insist, therefore, that there is not any warrant for the holding of the Court that one joint tenant may sue for the benefit of others, or that the legal title to the property of a dissolved corporation vests in its stockholders. Section 240 Judicial Code provides that—

> "In any case, in which the judgment of the Circuit Court of Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

4. WHEREFORE, Petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court, requiring the United States Circuit Court of Appeals for the Sixth Circuit to certify and send to this Court a full and complete transcript of the record and proceedings in this case of said Court of Appeals, the style therein *Stearns Coal & Lumber Company, Plaintiff in Error vs. John S. VanWinkle, et al., Defendants in Error*, to the end that said case may be reviewed and determined by this Court, as !provided by law, and that Petitioner may have such further relief or remedy in the premises as to this Court may seem proper, that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that pending its consideration thereof supercedeas may issue withholding further proceedings in this case.

JAMES N. SHARP,

Attorney for Petitioner.

STATE OF TENNESSEE, }
COUNTY OF KNOX. }

J. N. Sharp, having been duly sworn, says he is attorney for the Stearns Coal & Lumber Company, Petitioner herein; that as such he is familiar with the facts in the Petition and such allegations therein, and that such allegations are true as he verily believes.

J. N. SHARP.

Sworn and subscribed to before me this..... day of March, 1916.

APPENDIX

Section No. 561. TERMINATION OF EXISTENCE OF CORPORATION—HOW EFFECTED.—Any corporation organized under this chapter may, by the consent in writing of the owner of the majority of its shares of stock, unless otherwise provided in the articles of incorporations or amendments thereto, close its business and wind up its affairs; and when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the County, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything.—*Kentucky Statutes.*

Section No. 25. NUMEROUS PARTIES—ONE OR MORE MAY SUE OR DEFEND FOR ALL. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.—*Kentucky Code.*

protest, claiming it would be only to preserve his rights. The court, after stating the general rule above quoted, held that he had ratified the plan of reorganization and was estopped, saying:

> This doctrine applies to the present case, and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to 885 of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between $5,000 and $6,000. *His privilege would have been absolutely nonexistent, except for the plan and lease which he attacks in this suit.* He was well aware of this, and he cannot *avail himself of the privilege* and at the same time *prosecute the suit.* The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. *Holmes* v. *Willard,* 125 N. Y. 75, 82, 25 N. E., 1083, 11 L. R. A., 170.
>
> As was said by the Supreme Court of Alabama in *Robinson* v. *Pebworth,* 71 Ala., 240, estoppel in a case of this character "simply means that *you shall not take the fruits of an illegal transaction and afterwards set the transaction aside as illegal.*" In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the provileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even *assuming it to be as unlawful* as he alleges, *he is in no position to assail it.* This defense is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity.

In *Post* v. *Beacon Vacuum Pump & Electrical Co.,* 84 Fed., 371, 28 C. C. A., 431, the United States Circuit Court of Appeals in the First Circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump & Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants being minority stockholders who opposed the transfer were *estopped* from maintaining a suit for rescission on the ground of *ultra vires, because they had subscribed for their proportion of the stock of the new*

corporation, although under protest, and had permitted such company to conduct the business for 18 months. The court said:

> It is clear that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be presumed to have been made at such time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. *That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion.* It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it.

In *Towers* v. *African Tug Company* (L. R. [1 Cr., 1904] 558), which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the English Court of Appeal is accurately stated in the head note as follows:

> A shareholder in a limited company who has, with full notice or knowledge of the facts, *himself received part of the proceeds of an ultra vires act* committed by the directors—such as payment of a dividend out of capital—and who still *retains the money*, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors.

Lord Justice Vaughn-Williams, in the course of his opinion, says:

> If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, *received their dividends* with knowledge of all the facts, and then brought this action *with the money still in their pockets,* ought they to be allowed to bring this action, which, as I have pointed out, is to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act.* Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others.

In the case of *International Contracting Co.* v. *Lamont* (cited as *United States* v. *Lamont*) 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160, a contractor's bid for dredging for the government was accepted by the engineers in charge, but the matter was held up by the Secretary of War. The work was readvertised, and pending this bid the contractor commenced a mandamus suit to compel the Secretary of War to sign a contract with him under his first bid. Before this suit was disposed of the bids under the second advertisement were opened, and it was found that the same contractor was again the lowest bidder, at a price much lower than his first bid. Being again the lowest bidder, he obtained a contract for the work, and the mandamus proceeding was dismissed. The contractor then demanded of the Secretary of War that he should sign the contract awarding him the work under the first bid, which was refused. Thereupon the contractor again commenced a mandamus to compel the execution of a contract under the first bid. The court, after holding that mandamus would not lie in such a case, proceeded as follows:

> But, even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator *is in no position to avail himself of such relief.* He en-

tered of his own accord into the second contract, and has acted under it and *has taken advantages which resulted from his action under it,* having received the compensation which was to be paid under its terms. Having done all this, he is *estopped* from denying the *validity* of the contract. *Oregonian Railway* v. *Oregon Railway,* 10 Sawy., 464, 22 Fed., 245. Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences.

In *North Chicago St. R. Co.* v. *Chicago Union Traction Co.,* 150 Fed., 612, 626, it is said:

> It seems, also, that the rule of inconsistent positions or quasi-estoppel applies as between the North and West and Union Companies. This subject is considered by Prof. Bigelow in his recent article on estoppel in 16 Cyc. 782. It seems from an examination of many of the cases cited by him that, if a person avails himself of the benefit of a transaction, he cannot be heard to deny its validity. The same rule is held in *International Contracting Co.* v. *Lamont,* 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160 (cited as *United States* v. *Lamont*),, and *Wormser* v. *Metropolitan St. R. Co.,* 184 N. Y., 83, 90, 76 N. E., 1036, Id., 98 App. Div., 29, 90 N. Y. Supp., 714. See, also, *Brazee* v. *Schofield,* 124 U. S., 495, 8 Sup. Ct., 604, 31 L. Ed., 484, above referred to.

In *Farmers Bank* v. *Groves,* 12 Howard 51, the bank sought to avoid an agreement upon the ground of fraud on the part of one of the parties, the court saying:

> Assuming that there was (fraud by Collier in the transaction), the bank could not *avail themselves of it* for the purpose of avoiding their part of the arrangement and at the same time *hold on* to the mortgage as a security for Collier's indebtedness. There has been no offer to *surrender* the mortgage and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier.

In *Compton* v. *Jessup*, 167 U. S., 1, it was held:

> Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien claimant, and who participate in the *benefits of an early sale* thus secured, cannot *object* to the enforcement of the lien in the manner pointed out by the decree.

In *U. S.* v. *Hodson*, 10 Wall. 395, the court held:

> If a bond is liable to the objection taken in this case and the parties are dissasisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal *enjoyed the benefits* which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

In *Daniels* v. *Tearney*, 12 Otto 415, the estoppel was applied in respect of a stay bond executed under a void act of the legislature. It was held:

> When a bond is voluntarily entered into and the principal *enjoys the benefits* it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

The court, referring to a similar case, said:

> In disposing of the case the court well said, "Upon what principal of exalted equity shall a man be permitted to *receive a valuable consideration* through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and *repudiate* the statute?
>
> Not to apply the principal of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principals of reason and justice.

In *Winslow* v. *Railroad*, 208 U. S., 59, it was held:

> By *accepting* the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are *estopped* to insist that the petition was not maintainable.

The Circuit Court of Appeals of the Eighth Circuit, in the case of *Loy* v. *Alston*, 172 Fed., 90 (Court of Appeals, Eighth Circuit) held:

> One who has *recovered damages* on the ground that he has been induced by fraud to make himself liable to pay a promissory note is *estopped* from successfully invoking the maximum, "He who comes into equity must come with clean hands" to defeat the subsequent collection of the note in equity.

The Court of Appeals of the Ninth Circuit, in the case of *Shackleton* v. *Baggaley*, 170 Fed., 57, 59, says:

> How can the appellants enforce a mechanic's lien for work and services performed under a contract and under a notice of lien which was filed *under the contract*, and at the same time allege that the *contract was void?* They deny that it is the purpose of the suit to rescind the contract. They admit that they entered into an agreement to waive a mechanic's lien. The evident purpose of alleging that the contract is void is to obviate the effect of that agreement. The argument is that the *fraud* practiced by the appellees, no matter when it was discovered, absolves the appellants from their obligation to file no lien, but leaves the contract *intact* in other respects. The proposition cannot be sustained. If the allegations of fraud are true, the appellants were thereby defrauded in the sum of $1,250. For this they had their remedy by an action for damages. They cannot, in a suit brought in equity to foreclose a mechanic's lien under a contract and a notice of lien *affirming the contract*, allege that, by reason of *fraud* discovered, we know not when, the contract or any part of it was rendered *null and void*. *Long* v. *Caffrey*, 93 Pa., 526; *Brezenski* v. *Neeves*, 93 Wis., 567, 67 N. W., 1125; *Pressed Brick Co.* v. *Barr*, 76 Mo. App., 380; *Pinning* v. *Skipper*, 71 Md., 347, 18 Atl., 659. In the case last cited, the court said:
>
> "If a party expressly contracts that he will not do a certain thing, or will not set up a certain claim against the other contracting party or his property, by resort to a certain process, it seems to us a legal anomaly to say that he can go on and do the thing, or avail himself of the forbidden process because he has a grievance against such other party on some other ground, or a claim which he can enforce against him by a different suit or process."

In *United States* v. *Morse*, 218 U. S., 493, it is held:

> The validity of a decree for the sale of an infant's real estate for purposes of reinvestment, and of the order appointing a trustee to make the sale, and of the bond reciting the due appointment of such trustee, executed to secure the faithful discharge by him of his duties, is not open to question by one who voluntarily became a surety upon the bond, *thereby enabling his principal to obtain the proceeds of the sale.*

In *State* v. *Bank*, 95 N. W., 1116 (Sup. Ct. of Minn.), it is held:

> The Germania Bank, organized under the state law, having a capital of $400,000, par value $100 per share, became insolvent, and made an assignment for the benefit of its creditors. Pending such proceedings, the bank was reorganized by the judgment of the district court under the provisions of chapter 89, p. 109, Laws 1897; the capital being reduced to $200,000. As a part of the reorganization scheme, those stockholders who paid up an assessment of $75 per share received stock to the amount paid, at par, in the reorganized bank, the other 25 per cent of stock held by them being canceled. All stock upon which the assessment was not paid was forfeited and canceled.
>
> Held, an original depositor, who, in consideration of his claim against the insolvent bank, received, as part payment, time certificates of deposit, and a certificate of stock in the bank as reorganized, and who, without objection, permitted the bank to reopen and transact business for the period of two years, is *estopped*, against a receiver of insolvency of the reorganized bank, from repudiating the transaction upon the ground that the same was invalid or irregular.

In *Seminole Securities Co.* v. *Southern Life Ins. Co.*, 182 Fed., 85, it is held:

> A stockholder of a corporation brought a suit in equity on behalf of himself and all other stockholders to have the affairs of the corporation wound up, alleging that fraudulent mismanagement by its officers had rendered it insolvent. Receivers were appointed who brought a suit in another state for the cancellation of a contract made by such officers on behalf of the corporation, which suit was compromised and settled with the approval of the court; the receivers being paid a considerable sum. Thereupon notice was sent to all stockholders

to come in and prove their holdings, and from the proceeds of the settlement of the receivers' suit a dividend of 20 per cent was paid to all stockholders. *Held,* that stockholders, who came in pursuant to such notice, proved their claims, and received their dividends, were *estopped* to afterward maintain suits to rescind their contracts of subscription for fraud and claim as creditors of the corporation the amounts paid for the stock or *to attack the validity of the settlement in the proceeds of which they had shared.*

In *Gaddes* v. *Pawtucket Institution for Savings,* 80 Atl., 415 (Sup. Ct. of Rhode Island), it is said (p. 420):

> Where a stranger to the title, or one having only a limited interest in a tract of land, conveys the property to another by deed or mortgage, *and the owner receives the benefit of any part of the proceeds, knowing the facts, he is estopped to deny that the deed or mortgage conveys a good title.* And likewise, if the owner, though ignorant of the facts when he receives the proceeds, *afterwards* learns the truth, *his retention of the proceeds* thereafter *estops him* from disputing the validity and effect of the conveyance. *Brewster* v. *Baker,* 16 Barb. (N. Y.), 613, 618; *Kahn* v. *Peter,* 104 Ala., 523, 16 South., 524; *Ansonia* v. *Cooper,* 66 Conn., 184, 33 Atl., 905; 16 Cyc., 787-791. See, also, *Brewer* v. *Nash,* 16 R. I., 458, 17 Atl., 857, 27 Am. St. Rep., 749; *Robinson* v. *Bailey,* 19 R. I., 464, 36 Atl., 1126; *East Greenwich Inst. for Savings* v. *Kenyon,* 20 R. I., 110, 37 Atl., 632.

In the case of *Sage* v. *Finney,* 135 S. W., 996 (Mo. App.), Finney had paid the dues on a policy of insurance on an agreement that he, Finney, should receive $1,000 of the insurance, the total of the policy being $2,000; when the policy became payable, Finney's payments, with interest at 6%, had amounted to about $1800; Finney, in accordance with a stipulation, was paid $1,000 and brought suit for the balance of the amount which had been paid by him, claiming that an agreement, by the terms of which one who did not have an insurable interest in the life of another should receive all or any precise amount of the insurance beyond such premiums and interest as the beneficiary may have invested therein, was invalid; Finney therefore claimed that he was equitably entitled to reimbursement for the total amount advanced by him.

The court held that Finney could not claim the benefits of the contract to the extent of accepting the $1,000, relying on it as the basis of his suit, and *at the same time attack the contract as invalid.* The court says:

> Though it be that an invalid contract affords no grounds for an estoppel unless it has been fully executed by the parties, it is true as well that *one may not both claim under and against the same deed.* One may not appropriate to himself rights such as the equities asserted here which accrue alone *from the contract,* and at the same time *deny* the efficacy of the undertaking with respect to the rights of an adversary. If a person predicate his cause, as does Finney here, on a right accruing to him under a contract, he is estopped from denying such portions thereof as are against his interest, and this is true, though such portion be invalid, for he must take it *cum oncre* or not at all. He is estopped from assuming such *inconsistent positions.* For an application of the principle where one has accepted the benefits of an invalid contract, see *Morris* v. *Hall,* 41 Ala., 510, 536, 537. In *Robinson* v. *Pebworth,* 71 Ala., 240, 247, the doctrine is stated to be that, *though the transaction is illegal, one may not claim both under and against the same title.* So, where one accepts the benefits of an invalid mortgage, it is determined that he is estopped to thereafter assert its invalidity. *Horton* v. *Davis,* 26 N. Y., 495. The identical principle finds application too, and is illustrated, in numerous instances where it appears persons have accepted benefits under invalid judicial proceedings, for it is said they may not thus *accept the benefits* of the judgment and *dispute its validity.* One must not be inconsistent in the positions he assumes, and, if he *claims the benefits* of such invalid proceedings, he is thereafter estopped to *assert their invalidity. Hoffmire* v. *Holcomb,* 17 Kan., 378; *Babbitt* v. *Corby,* 13 Kan., 612; *Pursley* v. *Hays,* 17 Iowa, 310; *Lee* v. *Gardiner,* 26 Miss., 521. For applications of the general principle to one claiming both under and against the same deed, see *Jacobs* v. *Miller,* 50 Mich., 119, 15 N. W., 42; *Swanson* v. *Tarkington,* 7 Heisk. (Tenn.) 612, 614, 615. To the same effect, see Bigelow on Estoppel, (5th Ed) 684; Herman on Estoppel, 1040, 1039. See, also, *Board Supervisors* v. *Allen,* 99 N. Y., 532, 2 N. E., 459. As above stated, Finney has already received $1,000 of the fund; for, upon the Supreme Council paying the $2,000, $1,000 thereof was awarded to him under a stipulation, and plaintiff made no claim whatever thereto.

> Besides accepting benefits to that extent under the contract after suit was instituted, plaintiff predicates his entire right with respect to the greater portion of the $1,000 now in court *on equities accruing out of the contract,* and, so doing, he is *estopped to assert the invalidity of the limitation* therein prescribed fixing his interest at $1,000.

(d) *The doctrine of equitable election is a complete bar to a recovery by the Trust Company.*

We are not invoking a technical estoppel *in pais,* but the broad equitable rule, whether called estoppel or equitable election, or whether comprehended within the maxim that "he who seeks equity must do equity," which effectively prohibits a party to litigation from claiming *under* and *against* the same instrument,—a rule thus stated by this court in *Peters* v. *Bain,* 133 U. S. 670, which was a case involving a voluntary assignment alleged to be in fraud of creditors:

> The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must *accept* or *reject* one or the other; *and so, in other words, that one cannot take a benefit under an instrument and then repudiate it.*

In the recent case of *Merchants National Bank* v. *Sexton,* 228 U. S. 634, this court holds that one claiming the benefit of a contract will not be permitted to *approbate* and *reprobate* at the same time. It is there held:

> Creditors of a bankrupt seeking to enforce a contract between the bankrupt and its debtor, and the lien arising therefrom, so far as the avails of certain collateral are concerned, may not *enforce* rights given under one provision of such contract and *repudiate* another provision where the two are under the contract indissolubly associated, the one being the complement of the other.

The doctrine of equitable election, originally applicable to deeds and wills, has been extended to "contracts for a valuable consideration resting in articles" and to "contracts for value com-

pleted executed by conveyance and assignment" (*Codrington* v. *Lindsay*, 8 L. R. Ch. App., 578, 587), and is defined as follows:

> An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principal that a person claiming under an instrument shall not interfere by title paramount, to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument. (Bispham Prince Eq., Sec. 295, Story's Eq. Jur., Sec. 1076, and Pomeroy's Eq. Jur. (37 Ed.), Sec. 295; Vol. 11 Am. & Eng. Enc. Law (2nd Ed.), p. 59.

Does not the reason of the rule apply with compelling force to the Trust Company, even under the theory of liability adopted by the Court of Appeals?

The Trust Company, as a *creditor*, had an equity, let us say, in the property of the Belt Company. As a *stockholder* it had *no* equity until *after* the claims of creditors were paid in full. The reorganization plan operated to give to the Trust Company as *stockholder* a benefit, a portion of which, (and perhaps all), was already its own as a *creditor* of the Belt Company. Why was the Trust Company not compelled to make an election between the acceptance of a benefit (as stockholder), under the instrument. and the retention of its equity (as creditor), already its own, which was attempted to be disposed of in favor of third parties (stockholders) by virtue of the same instrument?

The Trust Company elected to accept the benefit under the plan and received one and one-half million dollars, par value, of the securities of the Southern Company, of which $407,474.00 par value (or $865,927.70 par value if we consider the Southern stock received by the Trust Company) was a trust fund which *belonged to creditors*, according to the Court of Appeals. Does it not shock the conscience to say that the Trust Company as a stockholder may wrongfully appropriate to itself a fund which *belongs to creditors possessing a higher equity*, and then, *as a creditor*, recover from the Southern Company because of that very wrongful ap-

propriation by itself and other stockholders? It is a sufficient answer to say that the four elements of a technial estoppel in *pais* are lacking?

The doctrine of election which prevents the assertion of repugnant rights is but an extension of the law of equitable estoppel. (*Fox* v. *Windes,* 127 Mo., 502, 512; 1 Herman on Estoppel and *Res Judicata,* page 11.)

The Trust Company is held in law to have *renounced* and *relinquished* every right *inconsistent* with the provisions of the reorganization plan and agreement. (2 Herman on Estoppel and *Res Judicata,* Sec. 1028, page 1156; *Fox* v. *Windes,* 127 Mo., 512; *Stone* v. *Cook,* 179 Mo., 534, 545.)

(e) *The doctrine of equitable estoppel is also a complete bar to a recovery by the Trust Company.*

In *Farmers Trust Company* v. *Railway Company,* 120 Fed., 1006, the intervener was both a creditor and stockholder in a company passing through reorganization. He exchanged his stock under the reorganization plan for the securities of the new company and then sought to hold the new company for a judgment against the old company. The court disposed of the contention briefly, and it is believed logically and concisely, by the use of the following language:

> The intervener here cannot be permitted *to blow hot and cold,* and having entered into the reorganization, he must be held to be bound by his action.

In *Matthews* v. *Murchison,* 15 Fed., 691, it was held:

> A bondholder of a former organization has no standing in chancery to dissolve the present organization of a railroad company, for which his agent had voted his bonds, it was alleged, in excess of authority, and to enforce a different plan, where it appears that he had known of what his agent was doing, but had not dissented, *and that he had accepted his share of the bonds of the new organization,* had offered to buy and sell, and had brought suit for them. *Such conduct ratified the act; or, inducing others to believe he had acquiesced in the organization, worked estoppel.*

In *Symmes* v. *Union Trust Co. of N. Y.,* 60 Fed., 830, it is stated in the syllabus:

Stockholders who have had full knowledge of a plan of reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, *are estopped*, after the reorganization is complete, to maintain a suit, as owners of the stock on which they did not subscribe to overthrow the same on the ground of fraud and conspiracy.

In *Vose* v. *Cowdrey*, 49 N. Y., 336, 343, the court said:

> He cannot be permitted to assert that the agreement of October 3, 1861, was fraudulent as to creditors and that he is entitled to pursue the property on that ground, for he admits in his complaint that he was a party to and one of the trustees under that agreement, and that in pursuance of it he surrendered a large amount of bonds of the La Crosse & Milwaukee Railroad Company, thus entitling himself to the benefits of the agreement. *Being such party, he also necessarily assented to the issue of the new stock to the old stockholders*

To the same effect are:

Reagan v. *First National Bank*, 61 N. E., 575;
Jessup v. *Hulse*, 21 N. Y., 168;
Bank v. *Heckman*, 148 Ind., 490, 47 N. E., 953;
Jacobs v. *Lumber Co.*, (Tex.) 15 S. W., 236;
Mitchell v. *Mitchell*, 61 Atl., 570;
Kahn v. *Peter*, (Ala.) 16 So., 524;
Ollivet v. *King*, 8 De. G., M. & G., 110, 114 Rev. Rep., 48;
Perisho v. *Perisho*, 71 Ill. App., 222;
Rapalee v. *Stewart*, 27 N. Y., 310;
Canton, etc. v. *Rolling Mill Co.*, 155 Fed., 321;
Thompson v. *Cohen*, 127 Mo., 215;
Gutzweiler v. *Lackman*, 23 Mo., 168;
Smith v. *Espy*, 9 N. J. Eq., 160;
Richards v. *White*, 7 Minn., 345;
Fiske v. *Carr*, 20 Me., 301.

III.

Under the rule of the Boyd case the Trust Company is not entitled to recover.

The equitable doctrine of election and estoppel, for which we contend, finds a distinct and express recognition in the majority opinion in the Boyd case. It is there said that a reorganization may be had in pursuance of a private contract between bondholders and stockholders, and that *"the transaction would be binding between the parties,"* but that such a transfer by stockholders from themselves to themselves cannot defeat the claim of a *"non-assenting creditor."* In other words, a reorganization agreement is binding upon all who *assent* to it and, *a fortiori,* is binding upon those who, like the Trust Company, derive and retain a large pecuniary *benefit* from it. The court is careful, in speaking of those who are entitled to attack such a reorganization, to use the expression "non-assenting creditors," the obvious meaning being that no such attack, as was made by Boyd upon the reorganization plan of the Northern Pacific Railway Company, can be made by one who has *assented* to the reorganization or *benefited* by it.

Not only is it true that one who has *participated* in a plan of reorganization will not be permitted to attack it, but one to whom fair terms have been *"offered"* cannot thereafter be heard in a court of equity to attack it. It matters not whether the tender be accepted or not. If accepted, the creditor becomes a *party* to the reorganization, and it is *binding* upon him. If he declines to accept, then a court of equity will not aid him, because he is unwilling to do equity himself.

If the tender is not made and kept good "he retains the right to *subject the interest of the old stockholders in the property to the payment of his debt.*" This is the measure of the rights of a "non-assenting creditor." Conversely, it clearly defines what a *consenting* creditor or a *participating* creditor may ***not*** do; he may *not* "subject the interest of the old stockholders in the property to the payment of his debt," as the Trust Company is seeking to do in this case.

IV.

The Trust Company is barred from a recovery in this action by its covenant that it would not hold the new company for the debts of any of the old ones.

The Court of Appeals says (Opinion, p. 17), that "it may be" that the Trust Company would have been estopped if the reorganization agreement had disclosed a purpose to divert the equity of the creditors of the Belt Company to its stockholders, but they say that the law which requires creditors to be paid before stockholders must be read into the agreement, and that the legal presumption (notwithstanding the covenant) was that the committee would pay the creditors, and that the Trust Company had a right to reply upon this presumption when it signed the agreement until notified to the contrary. The covenant in question, it is said (Opinion, p. 19), barred the Trust Company from asserting only such rights, trusts, liabilities, and obligations "as arose out of the lawful and equitable execution of its contract," and furthermore, (Opinion, p. 20), that the obligation and liability of the Southern Company in this case "was not created by the agreement," but by the Southern Company's "subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity," or as elsewhere stated "by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholders or bondholders."

The Court of Appeals proceeds upon the assumption that the plan carried the presumption that some fair offer would be made to creditors, and that the plan, therefore, was a valid and lawful plan until after the Trust Company had received its securities in July, 1900, and *then it became fraudulent and voidable only when the Trust Company's debt was not paid.* It is said (Opinion, p. 30), that "the *fraud* and breach of trust, which made the transfer voidable as to creditors, were not committed or disclosed until *after* the Trust Company's acts in the formation and execution of the plan had been done."

(a) It is confidently asserted that if the reorganization plan was *ever* fraudulent and voidable as to creditors, it was so at the time of its execution by the Trust Company. It is a new doctrine that the plan must *affirmatively* show upon its face that creditors will *not* be paid in order to be subject to criticism. On the contrary, in the reorganization agreement in the Boyd case, which the majority opinion holds to be fraudulent as to "non-assenting creditors," it is said:

> The agreement contained *no provision* as to the payment of unsecured creditors.

And also:

> The invalidity of the sale flowed from the *reorganization agreement.*

The same is true of the plan in the *Monon* case, 174 U. S., 674, and in the Howard case, 7 Wall., 392.

The *covenant* in the twelfth paragraph, to which the Trust Company assented, was a distinct and unequivocal *caveat* that no claims against the old company could be enforced against the new company. How can the *covenant* and the *presumption* co-exist in the same instrument, since the covenant *excludes* any such presumption?

No presumption could arise to contradict the plain meaning of the plan, which was that $475,000, and no more, was set aside to pay the floating debt, which meant such debt as it was necessary to pay in order to make the mortgage of the new company a first lien (Rec., 999, 1000). How can this provision be said to raise a presumption that *all* the floating debt of *all* the companies was assumed by the Committee or the Southern Company?

(b) There could be no presumption that the floating debt would be paid, on which the Trust Company could rely, for the Trust Company must have known that no such thing was possible, and certainly that no such thing was contemplated by the plan. The reorganization agreement disclosed on its face the specific appropriation to be made of *all* the securities and of *all* of the funds of the new company. Its bonds and stocks were to be used (1) in exchange for old securities, (2) for future requirements

of the company which included future additions, betterments, and new equipment (Rec., 950) and (3) for the cash requirements of the company which are specifically stated (Rec., 951). The available assets of the new company are all accounted for, the sum of $475,000 being set aside for the payment of the floating debts of *all* of the constituent companies (Rec., 951). The floating indebtedness of the Belt Company *alone* was $900,000 (Rec., 873).

The Trust Company knew this because it knew the financial condition of the Belt Company. All of the officers and directors of the Belt Company, except one, were officers, directors, or employes of the Trust Company (Rec., 874). "The inter-relations of the Belt Company and Trust Company were exceedingly intimate" (Rec., 879), and the Trust Company kept some of the books of the Belt Company (Rec., 689).

It is a violent and wholly unwarranted presumption to assume that the plan contemplated the payment of the floating debt of *all* of the companies when but $475,000 was set aside for that purpose, and the floating debt of *one* company alone was *twice* that amount, as the Trust Company must have known.

(c) Whether the reorganization plan was fraudulent and void *at the time* the Trust Company became a party to it, or only became so *afterwards* when the Trust Company's debt against the Belt Company was not paid, cannot be a decisive feature of the case. Whenever the plan, or action taken under the plan became fraudulent as to creditors, the duty *immediately* devolved upon the Trust Company to *elect* whether to accept the benefits of the fraudulent scheme, or to *retain* them if they had already been received. The duty to tender back the fruits of an illegal and fraudulent transaction upon a discovery of the fraud is an imperative duty, and is an indispensable condition to the maintenance of any action based upon the fraud. The equitable rule of estoppel, or election, or ratification, becomes at once applicable. *A retention of the fruits of the fraud is a conclusive election to hold under the plan and is an insurmountable barrier to any attack upon the plan.* (*Stone* v. *Cook*, 179 Mo., 534; Vol. 11 Am. Eng. Enc. of L. [2nd Ed.] p. 98; *Young* v. *Young*, 27 Atl. Rep., 627; *Medill* v. *Snyder*, 58 Pac. Rep., 962).

(d) It is respectfully submitted that if any liability could, under any circumstances, exist against the Southern Company, it must necessarily be a liability *created by the reorganization plan or agreement* and as such barred by the covenant since, as said in the Boyd case, "the invalidity of the sale flowed from the *agreement.*" The bar of the covenant cannot be escaped by the assertion that the liability was created, not by the agreement, but by the transfer of the Belt property. The foreclosure cannot be divorced from the *agreement* since they are part and parcel of the same transaction. The Court of Appeals itself recognizes this fact when it says (Opinion, p. 819):

> For what purpose then was the foreclosure? Evidently to *carry out* the reorganization agreement.
> * * * * * * *
> Was not the *scheme of reorganization* the *primary cause*, the *vesting of the fee* of the Belt property in the Southern Company by the foreclosure the *object and effect* of that scheme, and the exchange of the stock and the foreclosure of the Belt mortgage the *means* contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.
> * * * * * * * *
> By virtue of the *plan of reorganization*, the Trust Company (this is obviously an error, it was intended to read Southern Company) had become such trustee (for unsecured creditors.)
> * * * * * * * *
> They (the acquisition of the property of the Gulf Company and later of the Belt Company) appear to this court to constitute a single transaction instituted, conducted, and consummated *pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company* and to bring them directly under the lien of its mortgage.

It will not do to say that the Southern Company's liability "was not created by that agreement but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholders, and trustee for its creditors, without securing and paying to them the value of that equity."

A transfer of the equity of the creditors of the Belt Company was solely in pursuance of the reorganization agreement and would not and could not have occurred *but for the agreement*. The Trust Company, as a party to the agreement, cannot deny this fact. The agreement, as the court says in the excerpt above quoted, was the "primary cause," the foreclosure sale the "object and effect" of the scheme, and the exchange of stock the "means" employed. Therefore, it seems plain and clear that if any liability was created on the part of the Southern Company by the exchange of stocks (which was the "transfer of the equity of creditors of the Belt Company"), such liability was *created* by the reorganization agreement; and it necessarily follows that the assertion of such liability is effectively barred by the covenant.

(e) Furthermore, the Court of Appeals says (p. 19), that if any equity or trust were created or conferred by or under the reorganization agreement, they were conferred, not by the just and lawful execution of the agreement, but "by an inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholder." But it was the *exchange of stocks*, to which the Trust Company was a party, which created the so-called "inequitable and fraudulent appropriation of the Trust Company's equity in the property" and the exchange of stocks was only a *means*, as the Court of Appeals itself says in the above quoted excerpt, of carrying out the reorganization plan. The exchange of stocks could not have taken place but for the plan, and was directly caused by the plan. If the exchange of stocks resulted in the fraudulent diversion of assets to stockholders, then the covenant obviously operated to bar the assertion or enforcement of such right.

The obvious and clear meaning of the covenant, without the necessity of resorting to any refinement of reasoning, was to make it clear to all depositing security holders that if they took the benefits of the plan they thereby waived the assertion of any and all rights, liabilities, trusts, or obligations against the new company arising out of any dealings with the old companies or any of them.

V.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the Master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

(a) The findings of the master in respect to the value of the Belt property at the time of the foreclosure sale, which was more than a year after the exchange of stocks had taken place, will be found in the record (pp. 990-991). In substance, the master found that there was no *direct* testimony showing the value of the properties involved in the reorganization plan at the time of or prior to the foreclosure of the mortgage liens thereon; that there had been introduced considerable testimony tending to show that all the roads forming the Belt system were extravagantly built and were bonded largely in excess of their actual cost; that the considerations paid at the foreclosure sales were large and sufficient, being approximately the full amount of the bonded indebtedness upon the railroads foreclosed; that there was no proof in the record to show that the Belt properties sold under the mortgage foreclosure were worth anything *in excess* of what they brought at the sale, and, in the absence of such proof, the master specifically found that the amount for which they were respectively sold was their *fair market value at that time;* and that there was nothing in the record to show that the reorganization scheme in any way deprived the unsecured creditors of any rights they would otherwise have had, in case such scheme had never been consummated.

It is conceded that the mortgage indebtedness of the Belt Company was $1,000,000, and that it was sold at foreclosure sale for that amount.

There was no *direct* testimony of the value of the Belt property. No witness, qualified as an expert, gave his opinion as to the value of the property as an entirety. Such testimony would have been of little value, since railroad property is ordinarily valued (*Smythe* v. *Ames*, 169 U. S., 466, 547) by ascertaining (a) the cost of construction; (b) the cost of reproduction; (c) the

market value of outstanding stocks and bonds, and (d) the value reached by capitalizing the net earnings.

It is apparent from the record that the master had before him ample evidence upon *all* of these questions, although such evidence is not here to be reviewed. At page 990, the master says:

> There has been produced in this cause considerable testimony tending to show that all the roads forming the Belt system were extravagantly built and were bonded in excess of the actual cost.

Here was evidence as to the *cost of the road*, which, in view of its newness, would be approximately the cost of its reproduction.

It is apparent that the master had before him a very large amount of testimony as to the *market value of the stocks and bonds* of the Belt Company since that question was involved in the accounting feature of the case. (Rec. 800-833.)

There was also ample testimony before the master as to the financial operation of the Belt Company and its *net earnings*, if any, since one of the issues in the accounting case was whether the Trust Company did not, while insolvent, pay dividends in 1893, 1894 and 1897. (Rec. 834.)

It is submitted, therefore, that the record affirmatively shows that there was testimony before the master as to *all* the bases for fixing the value of railroad property, and with this evidence before him, the master finds (Rec. 990), in speaking of the amount bid at the foreclosure sales, that:

> The considerations paid for such properties were *large and sufficient*, being approximately the *full amount of the bonded indebtedness* upon each railroad foreclosed.

It is evident that the master's finding that the prices paid at the foreclosure sales were ample was not merely based on the amount for which the properties were sold, *but upon the testimony in the record directed to the recognized elements for valuing railroad property.*

The master finds (Rec. 991):

> 5. If respondent's contention is correct to the effect that there was a consolidation, *de facto*, by which the intervenor became liable for the Belt indebtedness, still there is no proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; and in the absence of such proofs, *the master finds that the amounts, for which they were respectively sold, was and is their fair market value at that time.*

The master was doubtful whether the properties were worth as *much* as the amount of the bonded indebtedness. There was considerable testimony, as he states, that they were worth *less* than their bonded indebtedness. There was no testimony that they were worth *more*. In order to be on the safe side, and *giving to the Trust Company the benefit of any doubt*, he finds that the fair market value of the Belt property was the amount for which it sold at foreclosure sale, to-wit,—$1,000,000.

The master undoubtedly had in mind the rule that the stockholders should not preserve an interest in the property to which the creditors had a prior right, *and it was therefore, his purpose to ascertain, as a question of fact, if any value of Belt property was being derived from its unsecured creditors.*

This is apparent because he says (Rec. 991):

> It was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw fit, *provided that it is not shown that in so doing it was a part of their scheme to give something of value to the stockholders that should have gone to the creditors.*

The master was also obviously anxious to ascertain if a reorganization plan had operated to the detriment or disadvantage of any of the unsecured creditors of the Belt Company, and his conclusion was that it had *not*. This is apparent from his finding (Rec. 991):

> It is not shown in the record that the reorganization scheme *in any way* deprived the unsecured creditors of any rights they would otherwise have had *in case such scheme had never been consummated.*

It should be constantly borne in mind that *no exceptions* were taken by the Trust Company to these findings of the master, and that such findings were based upon testimony which was not brought to the Court of Appeals. It is also to be borne in mind that the valuation made by the master in this "adversary proceeding," as that expression is used in the Boyd case, was *at the time of the foreclosure sale of the Belt properties*, which was nearly *two years* after the foreclosure of the Gulf property and more than *one year* after the distribution of the securities of the Southern had taken place. Whatever increased value could arise from the *reorganized system*, as distinguished from the aggregate value of all the roads as separate units, had already taken place. The Trust Company had had an opportunity to litigate, and had litigated in this action, the value of the Belt property at the time of the foreclosure sale, and the master's finding, to which no exception was taken, should, therefore, be taken as coming within the rule stated in the *Boyd* case as follows:

> In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by *adversary proceeding*, in which it would have been to the interest of the stockholders to interpose every valid defense.

(b) If mortgaged property is sold for the amount of the mortgage, which is its *fair market value*, how can creditors be injured, and what ground is there for complaint, whether the sale be the result of a reorganization plan or not? In such a case, what difference does it make whether the former stockholders of the company, whose stock is practically valueless because the property is mortgaged to its full value, receive stock in the new company which represents practically no value or interest in the mortgaged property for the same reason? If the Belt Company had conveyed its property to the Southern Company in consideration of the cancellation of its mortgage and without foreclosure, the result would have been the same.

The enforcement of the mortgage of the Belt Company left nothing available to general creditors. It is true that the stockholders of the Belt Company received stock of the Southern Com-

pany which had a value, but that value arose from the fact that it represented property of *other companies than the Belt Company* and the right to participate in the prospective earnings of such other companies.

Surely a reorganization cannot be said to *create* rights in favor of creditors which did not exist before, or to give value to a creditor's claim which was *valueless* before. The claim of the Trust Company, even after the consummation of the reorganization plan and at the time of the foreclosure sale of the Belt property, was *without commercial value* for the reason that it was against a company whose assets were charged with a lien to secure an indebtedness which exactly equalled the fair market value of the property.

After the foreclosure a startling transformation has taken place since, according to the Court of Appeals, the claim is then worth dollar for dollar, simply because the mortgagee has foreclosed his lien, which is conceded to be a valid one, and the property has been sold for its fair market value, which is the exact amount of the mortgage indebtedness.

The purpose of the law against fraudulent conveyances is to *preserve* the rights of a creditor against the debtor's property, but the effect of the decision of the Court of Appeals in this case is not to preserve a right which existed, but to *create* a right where none existed before.

Where is the *equity* in the Belt property which warrants the Court of Appeals in imposing upon the Southern Company a judgment for $700,000? This judgment, to be valid, must represent an equity in the Belt property which the old stockholders of the Belt Company preserved for themselves, but the record demonstrates that no such equity existed.

(c) It is respectfully submitted that the Court of Appeals is in error when it says (Opinion, p. 12):

> But the crucial issue here was not what the fair market value of the property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage.

It is our contention that this is not only the crucial issue, but the *whole issue*. If it be once established in an adversary proceeding that the fair market value of a property, which has already become a part and parcel of a reorganized system against which stocks and bonds have already been issued, does not exceed the amount of its valid mortgage indebtedness, then no equity to which creditors are entitled to resort has been diverted to stockholders, *and it makes no difference what stocks or bonds have been previously issued by the reorganized system.* As a stream cannot rise higher than its source, so the mere issue of securities cannot add to the *actual value* of property.

The Court of Appeals says (Opinion, p. 12) that the real issue was:

> What was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale?

What equitable interest available to creditors could there have been, if it be conceded that the fair market value of the Belt property at the time of the foreclosure sale did not exceed the mortgage indebtedness? The Court of Appeals quotes from the Boyd case to the effect that:

> If the *value* of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value whether it was present or prospective, for dividends or only for purposes of control.

Concede this and yet the question reverts to "the value of the road." The issuance of stock cannot *create* value. The value of the stock depends upon the *value of the road*. The value of the road is not dependent upon the amount or par value of stock issued.

(d) We submit that the real issue is tersely and accurately stated by the Court of Appeals for the Sixth Circuit in *Wenger* v. *Railroad Company*, 114 Fed., 34, as follows:

> To the extent that the property is worth something more than the mortgages the general creditors are interested in

any subsequent distribution, but beyond that their interest does not extend.

The sole question is: had the railway property, as it existed at the time of foreclosure, a greater value than the mortgage indebtedness? And that such value existed is not averred.

The court in the Monon case, 103 Fed., 130, in speaking of the rights of creditors, said:

What are their rights? Manifestly to have any surplus of value in the property or in its proceeds over and above the mortgage debts applied to the payment of their demands.

The *Boyd* case is not in conflict with this contention. In that case, there had been no "adversary proceeding" to determine the value of the property as there has been in this case. There, there was a "distinct recital" in the plan itself that the property to be purchased was agreed to be "of the full value of $345,000,000." This was an admission by the company itself and *prima facie* established the value. The strong intimation in the opinion is that if there had been an adjudication, binding upon the claimant, that the fair value of the property did not exceed its mortgage indebtedness, and that it had been sold at forced sale for the full value, there would have been no equity on which the claims of creditors could operate, and hence there could be no recovery by an unsecured creditor. In fact, the court says:

If their (the old stockholders') stock is worthless, he (the creditor) gets nothing.

(e) But the Court of Appeals points to the fact that the old stockholders of the Belt Company received $1,187,500 of the preferred stock and $3,562,500 par value of the common stock of the *Southern Company* in exchange for the stock of the Belt Company, and by a process of reasoning reaches the conclusion that the *Southern Company*, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company. (Opinion, p. 15.)

But it must be remembered that the stock of the Southern Company represented *six* companies having a total bonded in-

debtedness of $29,685,000, of which the Belt Company with its bonded indebtedness of $1,000,000 was three and one-third per cent. It is quite possible, and, in the light of the finding of the master as to the value of the Belt property, practically conclusive that whatever value attached to the stock of the Southern Company which was received by the Belt stockholders was derived from the five companies other than the Belt Company. At the time of the issue of this Southern stock, the Southern Company was the owner of the stocks and bonds of the Belt Company, but not of its physical property. As the value of the physical property of the Belt Company did not exceed its mortgage indebtedness, its stocks and bonds held by the Southern Company could not have exceeded that value.

It is not a question of the *par value* of the stocks and bonds. (*Knoxville Water Company* v. *Knoxville*, 202 U. S. 1; *Smythe* v. *Ames*, 169 U. S., 466, 547; *Missouri, K & T. Railway Company* v. *Love*, 177 Fed., 493.) The market value of stocks and bonds is sometimes used as a *means* of arriving at the actual value of railroad property, but once the actual value is established, *such value is controlling*. It is submitted, therefore, that the finding of the master in respect to the value of the Belt property is conclusive against the assertion of any claim by the Trust Company in this case.

(f) Furthermore, the Court of Appeals (Opinion, p. 13), as before stated, reaches the conclusion from a consideration of the stocks and bonds of the Southern Company issued in exchange for the stock of the Belt Company that there was an equity in the Belt property over and above its mortgage indebtedness of "at least $475,000." It is *conceded* (Opinion, p. 19), that the reorganization committee *actually expended* $1,164,172.50 in the payment of floating debts of the companies involved in the reorganization. Nowhere in the master's report (Rec. 999) is it stated *what part of the floating indebtedness so paid were debts of the Belt Company*. When the committee had paid the debts of the Belt Company to an amount in excess of $475,000, then upon the court's own theory, what equity was there from which the Trust Company's claim may be satisfied?

VI.

A resulting trust was created in favor of the railway companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company.

The decision of the Court of Appeals, on this proposition, it is submitted, is in conflict with decisions of courts of appeal of other circuits and with decisions of this court.

An implied or resulting trust arises from the circumstance of payment alone. It results in this case because the Gulf Company, the Belt Company and the Air Line paid the consideration for the properties, the legal title being taken in the name of the Central Company. (*Osborn* v. *Perkins,* 122 Fed., 127, 131; *Lauter* v. *Trust Co.,* 85 Fed., 894-903; *Condit* v. *Maxwell,* 142 Mo., 266; *Sanford* v. *Loan Society,* 80 Fed., 54; *Wade* v. *Sewell,* 56 Fed., 129; *Ducie* v. *Ford,* 138 U. S., 587; *Albright* v. *Oyster,* 140 U. S., 493.) The payments were presumably made from the proceeds of bonds, since the properties were constructed from money realized from the sale of their bonds (Rec., 851).

It is conceded by the Court of Appeals in its opinion (201 Fed., 827), that a trust resulted in favor of the railway companies, and that the lands were appurtenant to the railroads, and that the terms of the after-acquired clauses of their mortgages were broad enough to include them. The court says:

> Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained?

The court then proceeds to state the well-recognized and conceded principle that the mortgagee, by virtue of an after-acquired property clause, takes the property subject to junior liens, encum-

brances and equities under which the property comes to the mortgagor. Then follows a statement of the circumstances which, in the opinion of the Court of Appeals, operates to defeat the equity of the Southern Company as follows:

> In the case in hand, the Central Company acquired the property here in dispute for its liability to pay its stockholders the par value of its stock and *it held the property in trust to secure the payment to its stockholders of that liability.* The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The court adds, page 828 of the opinion:

> The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of the property, *had been represented by its promissory notes and a mortgage upon this land to secure them* and they had been pledged by their owners to secure their debt to the Trust Company.

If the properties of the Central Company had been taken in the name of an *individual*, instead of a corporation, the consideration therefor being paid by the railway companies, no one would deny that the after-acquired property clauses of the mortgages would immediately attach to them, subject to any liens or claims for unpaid purchase money. Why does the same result not follow when the titles were taken in the name of the Central Company, the purposes of the transaction remaining the same, the only difference being in the one case the legal titles are vested in an *individual*, and in the other case in a *corporation?* What is the magic surrounding the employment of a corporation for holding the legal title which so alters the situation that after-acquired property clauses of the mortgages become inoperative?

It is submitted that the courts have never before made such

a distinction. Where the properties are bought with the funds of the mortgagor for its purposes, it is universally held that the after-acquired property clauses attach immediately, *regardless of the circumstance that the legal title may be vested in an individual or in a corporation.*

The decision of the Court of Appeals is in *direct conflict* with the case of *Guaranty Trust Co.* v. *Atlantic, etc. R. Co.*, 138 Fed. 517, United States Circuit Court of Appeals, Third Circuit, which sustains our position to the fullest extent.

The facts are as follows: The Atlantic Company had given a mortgage upon all its property existing and to be acquired to the Guaranty Trust Company to secure an issue of 500 bonds of $1,000 each. It afterwards used a portion of the proceeds from these bonds to purchase the property of the Asbury Park & Belmar Street Railway Company from a bondholders' committee which had purchased it at foreclosure sale. *Instead of taking the property of this company in its own name, it determined to organize a new corporation to take it over.* Accordingly, the Asbury Park & Seagirt Railroad Company was organized, which took over the property, *issuing all its capital stock to the Atlantic Company,* and immediately executing a lease of all the property to the Atlantic Company for 99 years. Later, *the Atlantic Company pledged this stock to the Guaranty Trust Company* to secure a loan of $100,000. In a sale under foreclosure of the mortgage mentioned above given to the Guaranty Trust Company as trustee, it was contended by the Trust Company, and held by the lower court, that its individual lien upon the property of the Asbury Park & Seagirt Railroad Company acquired through the pledge of the capital stock was superior to the lien of the mortgage to secure bondholders of which it was trustee. Upon this point, the lower court was *reversed* upon appeal by intervening bondholders. Gray, Circuit Judge, writing the opinion, said, p. 526:

> As shown in the opinion of the court below, all beneficial interest and ownership in the franchises and property of the Belmar Company, were purchased by and resided in the defendant company, the bare legal title being held by the Asbury Park & Seagirt Railroad Company, as trustee, for the benefit and purposes of the defendant company, which had

paid the entire purchase price, and which remained the real equitable owner. The mortgage of July 1, 1896, both expressly and impliedly, covered equitable interests in after-acquired property appurtenant to or connected with the line of railroad controlled or operated by it. As soon as this equitable interest and ownership in the Belmar property was acquired, as hereinbefore described, by the defendant company, the lien of its mortgage attached itself thereto and remained upon it, both before and after the legal title had been placed in the Asbury Park & Seagirt Company. *Toledo, Delphos, etc. Railroad* v. *Hamilton*, 134 U. S., 296; *Central Trust Co.* v. *Kneeland*, 138 U. S., 414; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S., 1, 15. To hold that this were not so, *would be to work a fraud upon the holders of these bonds*, who were notified in the bonds themselves, and the declaration is recited in the mortgage, that they were secured by a mortgage conveying to the trustee (the complainant company) "all the certain railroad and other property, real and personal, and franchises of said railroad company, whether now owned or hereafter acquired by it."

The court further says, p. 527:

As we have seen, the court below, although holding that the real beneficial ownership of and in the franchises and property of the Belmar Company, had been acquired in the manner hereinbefore stated, as an addition to and extension of the line of the said defendant company, and that in consequence, this equitable right and ownership, as well as the legal title in the capital stock of the said Seagirt Company, came under the lien of the mortgage in suit, yet held *that the complainant company, by its holding the pledge of all of said stock, under the circumstances as disclosed in this record, had, in its individual capacity, a superior equity to that of the mortgage given to it and held in trust for the bondholders.*
* * *

In this, we cannot agree. *We do not think that the only way by which the lien of the mortgage upon this equitable ownership of the defendant company "can be enforced is by substituting for the railroad property itself that which fully represents it, namely, the capital stock of and the lease made by the new corporation." This ignores altogether the lien of the mortgage upon the equitable ownership itself. The capital stock held by the defendant company and thus pledged, represented the bare legal title of the property, whose full*

and entire beneficial ownership prior to the conveyance of the legal title to the Seagirt Company, was in the defendant company, and came, as we have seen, under the lien of the mortgage. On the transfer of the bare legal title to the Seagirt Company, this equitable interest in the property *remained subject to the lien of the mortgage,* and those who held certificates for any or all of the capital stock held subject to such lien. * * *

In the case before us, the defendant company, as the owner of all the capital stock of the Seagirt Company, may be estopped to assert a legal or equitable right in itself, as against its pledgee of said stock. *The controversy here, however, is not, in this respect, between the defendant company and the pledgee of this stock. It is between the pledgee of this stock and the creditors of the defendant company, who hold, by reason of the mortgage in suit, a lien upon the whole beneficial and equitable ownership of the defendant company in the line of railway acquired by it in the manner above described.* If the defendant company had sold a portion of this stock, surely the lien of this mortgage so held in trust for the bondholders, would not have been measurably misplaced by reason of lack of notice to the transferee of the stock, and it is difficult to understand how a pledgee of such stock can be in any different or better position than such a purchaser.

This equitable ownership, being the real and beneficial ownership, and subject to the lien of the mortgage in suit, may be sold under the foreclosure decree, and inasmuch as the Seagirt Company holds the mere naked legal title in trust for the equitable owner, it may be a question whether, as a passive trust, it will not be considered as executed, and the legal title thus pass with the equitable; or it may be a matter for consideration, as to whether any, or what, further proceedings may be necessary to perfect and protect the title of the purchaser. *However this may be, no rights were conferred by the pledge of the stock of the Seagirt Company, which were superior to, or could interfere with, the mortgage lien subsisting upon this plenary equitable title for the benefit of the bondholders under the mortgage.*

The decision of the Court of Appeals is also in conflict with the case of *New England Water Works Company* v. *Farmers' Loan & Trust Company*, 136 Fed. 521, Court of Appeals, Seventh Circuit (petition for writ of *certiorari* denied, 197 U. S. 622).

The Water Works Company executed a mortgage upon its plant containing an after-acquired property clause. The title to the property which it was claimed came within the scope of this clause was taken in the name of the *Boston Company*, which executed a mortgage upon the property. It was held that the property standing in the name of the Boston Company came under the after-acquired property clause of the mortgage of the Water Works Company notwithstanding the mortgage of the Boston Company. The court held that the after-acquired property clause attached *regardless of the form which the* transaction might take, saying:

> Here, then, in a sentence is the whole case: A mortgage on a necessarily expanding water works system—looking forward as well as to the present, and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property be created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise; and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can anyone doubt, that under such circumstances the new property, *whatever may be the legal form given to it*, is equitably but after-acquired property within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after-acquired property?

In *Farmers' Loan & Trust Company* v. *Denver Railroad Company*, 126 Fed. 46, Court of Appeals, Eighth Circuit, it was held that the after-acquired property clause of the mortgage attached to the real estate taken in the name of the Jefferson Investment Company, a corporation formed for the purpose of holding the title to the property. It may be assumed that the capital stock of the company was owned by the mortgagor or in its interest, although that circumstance was not deemed by the court to be of sufficient importance to require any statement concerning it whatsoever. Why was it not true that the Jefferson Investment Company acquired the property held by it "for its liability to pay its stockholders the par value of its stock," and why did it not hold "the property in trust to secure the payment to its stockholders of that liability," so as to defeat the after-acquired property

clause of the mortgage, as is said by the court in its opinion in this case? Why was not the situation the same as it would have been if the liability of the Jefferson Company to its stockholders "had been represented by its promissory notes and a mortgage upon this land," so as to create an equity superior to the mortgage?

The same may be said of the facts presented in *Wade* v. *Chicago Railroad Company,* 149 U. S. 327-341. There the title to the property, which was held to be subject to the after-acquired property clause of the mortgage, was taken in the name of the *Empire Construction Company* and the court said:

> The after-acquired clause of the mortgage of the Chicago, Springfield & St. Louis Railroad Company under the decisions of this court covers all acquisitions made to the property either *by the construction company or others acquiring rights under it.*

The Empire Construction Company had conveyed its rights, including the real estate in question, to Cooley & Co. and that firm in turn had conveyed them to certain newly organized companies, but it was held that even these conveyances did not defeat the operation of the after-acquired property clause of the mortgage.

If the Central Company had made a conveyance of its physical property to the Trust Company, would that have defeated the lien of the after-acquired property clause of the mortgage? Certainly not, since the Trust Company would have taken the conveyance with notice of the rights of the trustee in the mortgage.

In *Central Trust Company* v. *Kneeland,* 138 U. S. 414-424 property which was taken in the name of the *Toledo & Grand Rapids Railroad Company* passed under the after-acquired property clause of the Toledo-Delphos & Burlington Railroad Company.

In *Augusta Railroad Company,* v. *Kittel,* 52 Fed. 63, it was held that the after-acquired property clause of a mortgage of a railroad company covered the equitable title to certain lands, although the legal title was in the United States and also in the State of Florida.

The views entertained by the Court of Appeals in this case of the relationship between the corporation and its stockholders are most extraordinary. Broadly stated, the court holds, as we read the opinion, that a corporation holds its property in trust for its stockholders, and that this trust relation is sufficient to defeat the operation of the after-acquired property clause of a mortgage; and that the obligation of a corporation to its stockholders in respect to its property is substantially the same as it would be if the stockholders, in lieu of the stock, held the notes of the corporation secured by a mortgage on its property.

But stockholders possess no such rights. They possess a right to participate, according to the amount of their stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution in the assets remaining after payment of its debts. (Cook on Corporations, Sec. 12.)

Stockholders have no lien or claim against property of the company until all of the obligations, liens, claims, and equities against the company and its property have first been discharged in full.

In the case under consideration, the Central Company took the title to the properties *subject to the resulting trust in favor of the mortgagor companies.* The stock of the Central Company only represented a right to participate in the profits of the concern and in the distribution of its property *subject to this trust.*

What was the situation in its entirety? The Belt Company, taking it for illustration, needed certain terminal properties in Kansas City *for its own use.* It proceeded to purchase such properties indirectly through the Central Company, paying the consideration therefor and taking possession of the property and using it as though it were its own. It employed the device of placing the title to the property in the Central Company under the mistaken idea (*McGourkey* v. *Toledo Railroad Company*, 146 U. S. 536-566), that the lien of the mortgage would not attach to it, and that the property could be sold, if need be, free from its lien.

If the title had been placed in the name of an individual instead of a corporation, no question would have arisen. But it

was thought a corporation would be more convenient. The Central Company issued capital stock to the Belt Company in an amount corresponding more or less accurately with the purchase price of each piece of property as each sale consummated. This stock was a mere memorandum or evidence of the amount which each company from time to time had invested in the properties held by the Central Company. The Trust Company knew all about the transactions, as its officers were the officers of the Central Company, as well as of the Belt Company, and the books of the Central Company were kept in the office of the Trust Company. The railroad of the Belt Company was built with the proceeds of its bonds (Rec. 851). The bondholders were advised of this through the terms of the mortgage and they had a right to assume that as the mortgaged property grew it would come under the after-acquired property clause. We think the Court of Appeals is mistaken in saying (201 Fed. 827) that the mortgagee "parted with no value on account of this property," since it is reasonably certain that it was the proceeds of the bonds of the Belt Company, the Gulf Company and the Air Line, respectively, which furnished the consideration for the properties purchased for them in the name of the Central Company.

It is the particular province of a court of equity to look through a transaction to the substance of it, and to disregard the form or appearance it may take, as was done in the McGourkey case, *supra,* where the court said, in speaking of a complicated arrangement for the leasing of equipment to a railway company through the issue of car trust certificates:

> In fine, we are of the opinion that this transaction should be adjudged to be in law what it appears to be in fact, a purchase by the railroad of the rolling stock in question, and that the device of car trust certificates was inoperative either to vest the legal title in McGourkey *or to prevent the lien of the mortgage from attaching to it upon its delivery to the road.*
>
> *Smith* v. *Moore,* 199 Fed,. 690;
> *Linn Timber Co.* v. *United States,* 196 Fed., 593.

Let us take, for illustration, the case of the Belt Company with respect to any one of the pieces of property purchased for

it with its funds, the title being taken in the name of the Central Company and the capital stock of the Central Company issued to the Belt Company in an amount corresponding to the consideration paid. Is there any question that while the *legal title* was in the name of the Central Company the *equitable title* was in the Belt Company? We think not. Did the fact that the Belt Company accepted the stock of the Central Company operate to defeat the trust? On the contrary, the position of the bondholders was *strengthened. The Belt Company then possessed every interest in the property which it is possible for it to possess* in a court of equity. It was fortified with both the equitable title to the property itself and the stock of the company representing the property. It was so understood by the parties at the time and in the correspondence, record and books of the companies it is referred to as the property of the Belt Company, which the Central Company holds in trust for it.

Under these circumstances there can be no question that *the Belt Company's interest in this property passed to the trustee under its mortgage by virtue of the after-acquired property clause.* It was appurtenant to the railroad as the master found and as the Court of Appeals assumes. It was presumably paid for with the proceeds of the bonds and bondholders had a right to expect that the security of their mortgage would be augmented correspondingly.

The lien of the mortgage having attached to it, it was obviously impossibe to *defeat* or *dislodge* that lien by any transfer of stock of the Belt Company of by any act of the Belt Company whatsoever. The equitable title had passed beyond its reach and was securely vested in the trustee for the bondholders. Particularly is this so where the Trust Company cannot claim to be in the attitude of a *bona fide* holder of the stock. Not only was it conversant with all the transactions as above stated, but it was a trustee in the mortgages of the Belt Company, Gulf Company and Air Line. It controlled the affairs of the Belt Company to such an extent that it was able to strip it of all of its portable property when the insolvency of the Belt Company made it apparent that its control over the Belt Company would shortly cease. Moreover,

the Trust Company cannot claim that any of its money went into the purchase of these properties. The Trust Company in its answer (Rec. 137) states that the Gulf Company and the Belt Company "are in equity the *beneficial owners* of all of the property of the Central Improvement Company." They knew this at all times and cannot be heard to say that this beneficial interest did not pass to the trustee under the mortgages. The case of *Watson* v. *Bonfils,* 116 Fed. 157, is not controlling. Had there been involved in that case an after-acquired property mortgage, the equitable title would undoubtedly have passed under it. There is not in this case any express trust which conflicts with the resulting trust arising from the payment by the mortgagor companies of the purchase price of the properties involved.

Our views are strengthened by the language of the Court of Appeals itself, page 826, where it states that the Trust Company as the holder of the stock of the Central Company acquired an equitable interest in the *property* itself, saying:

> The Trust Company had such an equitable interest in the *property* of the Central Company by virtue of the pledge to it of 1,120 out of 1,407 shares of the stock of that company issued, that the Trust Company's appeal completely challenges the decree of the court with reference to *that property*.

If the possession of the Trust Company of this stock *as pledgee* gave to it *an equitable interest in the property itself,* why did not the *ownership* of the stock by the Belt Company give to it an equitable interest in the property itself which passed under the after-acquired property clause of its mortgage? And if this equitable interest did pass to the trustee, how could it ever have been afterwards divested from the trustee and reinvested in the Trust Company?

VII.

Even if it should be held that the Trust Company has a right of recovery, it should be limited to such equitable terms as in the opinion of the court should have been offered it at the time of the reorganization.

At the time of the reorganization there was a disputed claim as to the indebtedness of the Belt Company to the Trust Company. There was involved a very long accounting between the two companies covering a period of years. The Trust Company had controlled the Belt Company and its allied terminal companies during these years, and it was thought that its charges had been excessive, and that on a true accounting it would appear that instead of the Belt Company being indebted to the Trust Company the contrary was the fact. *Both* parties regarded such accounting as necessary. It appears from the stipulation dated November 12th, 1901, (R. 1034), that prior to that time the receivers of the Belt Company had filed a crossbill against the Trust Company demanding an accounting, and it was agreed in the stipulation that *an accounting should be had* upon an amended crossbill or ancillary bill, and that the accounting should be expedited, and that when it was concluded, a judgment should be entered in favor of the Trust Company if it should be successful, or in favor of the Belt Company if that company should be successful.

The Trust Company in the stipulation was represented by Judge Francis M. Black, formerly Judge of the Supreme Court of Missouri and one of the ablest lawyers our county has produced. The ancillary bill was filed according to the stipulation, and the Trust Company answered setting up various defenses, including the statute of limitations. The proceeding thus begun did not reach a termination until June 25th, 1910, and then *for the first time* the state of accounts between the Belt Company and the Trust Company was judicially determined.

At the time of the reorganization it was not possible to have offered to the Trust Company equitable terms in income bonds or preferred stock *since no one knew whether the Trust Company was in fact a creditor or not.* Its debt was honestly disputed, and

neither the parties nor any court, in advance of an adjudication, could have prescribed fair or equitable terms.

Under these circumstances, should the Southern Company be *penalized* for failing to do what was obviously an impossibility? The Southern Company should not be penalized for its failure to make to the Trust Company a fair offer either at the time of the reorganization or at the time that its debt was first established in June, 1910. The same court which, for the first time adjudicated the state of accounts between the two companies, also adjudicated that there was no equity in the Belt property available to creditors, and hence there was no obligation to offer terms. In fact, the doctrine that an interest to stockholders can be preserved by the issuance to creditors on equitable terms of income bonds or preferred stock was first announced in the *Boyd* case in April, 1913.

It is respectfully submitted, therefore, in view of the circumstances, that if the Southern Company should be held liable in this action, it ought not in equity to be required to pay to the Trust Company the full amount of its debt with the accumulated interest. Should not the court under such circumstances prescribe such equitable terms as should have been offered at the time of the reorganization if the Trust Company's debt had been then liquidated? Does it not appeal to the conscience of the Chancellor to adjust the Trust Company's claim, in the event that its claim is deemed valid, to the position which it would occupy now, if such equitable terms had been offered then? As stated in our application, if the Trust Company had been given par in the preferred stock of the Southern Company at the time of the reorganization, it would have received $360,000 par value, the average price of which during the year 1913 was $33.75, aggregating $124,000. If you add to this sum the dividends that would have been paid on the stock, together with interest on the dividends, the aggregate amount would be approximately $225,000. Or if you take the present market value of the stock together with the dividends paid and interest on dividends, the amount would be approximately $300,000. The judgment sought to be enforced against the Southern Company is over $700,000, or $400,000 more than the Trust

Company would have realized if the rule of equitable terms in the *Boyd* case had been anticipated, and could have been carried out at the time of the reorganization.

The Southern Company has done nothing to forfeit its right to such equitable consideration. The Belt Company and its receiver not only had the legal right to have the account between the two companies sifted by the process of an accounting to ascertain if the Trust Company had abused its power in imposing unrighteous debts and obligations upon the Belt Company, but it was considered a duty so to do, and the court appointing the receiver approved. The situation was such that Judge Black believed there should be an accounting, and he stipulated to that effect. Not until October 22nd, 1912, was there any judicial determination that the Southern Company was in any way liable for the debt of the Belt Company, nor until December 2nd, 1913, was that decision reaffirmed by the Court of Appeals.

We think it would be a most unjust result if the Trust Company should be permitted to retain the enormous benefits which it received under the reorganization plan, and at the same time hold the Southern Company liable for its debt against the Belt Company. And the harshness and, as we think, the injustice of such a result would be greatly intensified if this court should hold, as did the Court of Appeals, that the doctrine of offering equitable terms to creditors, announced in the *Boyd* case should be disregarded, and the Trust Company should be permitted to recover a personal judgment in an amount exceeding by at least $400,000 what such equitable terms would have amounted to.

VIII.

There was no exception to the Master's report in the court below challenging the correctness of his finding that the Southern Company was not liable for the floating indebtedness of the Belt Company. The decision of the Court of Appeals that such finding can be reviewed in an appellate court in the absence of exceptions is in conflict with the decisions of the courts of appeal of other circuits and with the rulings of this court.

The Trust Company excepted to the *report* of the master (Rec. 1038), for the reason that,

> The master has in his report stated as follows: "That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company;" whereas, the master in his report should have omitted reference to or recommendation concerning the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons:

The grounds specifically assigned were that that issue was not properly in the case for various reasons, but it was nowhere stated that the issue had been decided incorrectly.

The assignment of error in the Court of Appeals (201 Fed. 817) was that the court erred in *including* in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

It is not a case where the Trust Company "intended to present the question of the liability," but it is a case where the Trust Company intended *not* to present that question for decision. Its whole attitude was the strongest evidence of a desire to *escape* a determination of that question, and it framed its exceptions to the master's report and its assignment of error for that specific purpose. The Trust Company itself in its "Reply to Brief of Appellees Other than Cambria Steel Company," filed in the Court of Appeals, says, on page 4:

> The Trust Company regarded that question (the liability of the Southern Company) as out of the case.

It was the deliberate purpose of the Trust Company to avoid any exceptions to the master's report which would challenge the correctness of the master's findings on the liability issue.

It cannot be plausibly claimed that the exceptions filed in the court below by the Trust Company met the well established rule requiring definiteness and certainty so as to challenge the correctness of the ruling of the master on the liability issue. Aside from the fact that they were not *intended* to do so, they utterly failed to appraise the opposite party that it was called upon to meet this issue, nor did they advise either the master or the court that the Trust Company sought to controvert the master's finding in that regard. In *Sheffield Railway Company* v. *Gordon*, 151 U. S. 285, 290, this court points out that this degree of definiteness and certainty is required:

> Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet but that the master may know in what particular his report is objectionable and may have an opportunity of correcting his errors or reconsidering his opinions.

To the same effect are:

Columbus Railroad Company, Appeals, 109 Fed. 117, 219;
Sanford v. *Embry*, 151 Fed. 977, 982;
Vol. II, Street on Federal Equity Practice, Sec. 1486;
Vol. II, Foster's Federal Practice, Sec. 315.

Under this state of the record it was not a question of the assignment of errors, or specifications of errors, or the power of the court to notice a plain error. *There would be nothing here to review even if the appellant at the time of taking its appeal has specifically assigned as error the ruling of the court upon the liability issue.*

Assignments of errors are directed to the action of the *lower court* and are not directed to the action of the master in his findings of fact or conclusions of law, which are not excepted to.

It is true, as this court says in its opinion (201 Fed., p. 818),

that an appeal in a suit in equity involves a trial *de novo* in the appellate court and entitles the appellant to a just decree, and it is also true, as the court says on the same page, that this court may consider a plain error not assigned when a failure to do so would result in a great injustice.

But a hearing in an appellate court in an equity case is a trial *de novo* of the *case before the court*, as it was presented to that court, and as that court passed upon it, but not of the case *before the master*, and the power of this court to notice a plain error means that it may consider and correct an error of the *lower court*, but not an error which may have been committed by the *master*. The power of the court to notice a plain error merely *supplies the omission of an assignment of error.*

What is before the lower court upon the coming in of the master's report in an equity case? The answer is plain, that the master's report is to be taken as correct by the court, as assented to by the parties, except in so far as matters of law and fact are properly excepted to by the parties.

In *Medsker* v. *Bonebrake*, 108 U. S., 66, 72, this court says, in speaking of the functions and duties of the lower court under these circumstances:

> The findings of the master are *prima facie* correct. Only such matters of law and of fact as are *brought before the court by exceptions* are to be considered, and the burden of sustaining the exceptions is on the objecting party.

If the only matters before the lower court are those portions of the master's report to which exceptions are filed, as this court says, and the court accepts and incorporates in its decree the unchallenged portions of the master's report, how can the lower court be convicted of error for so doing?

The Trust Company had its election to except to the correctness of the master's conclusions on the liability issue, and it concluded that it would not challenge that portion of the report, contenting itself with saying that that issue was not properly in the case. We contend that the conduct of the Trust Company in omitting to except to the report of the master precludes it from raising that question upon appeal, *and this would be true even if it had*

assigned this question as error in the most formal and solemn manner in taking its appeal.

The decision of the Court of Appeals is in conflict with the case of *Burns* v. *Rosenstein,* 135 U. S. 449. There it was duly assigned as error that the court below erred in acting upon the master's interpretation of certain articles of the partnership contract as a valid part of his report; in construing the partnership contract as requiring losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits, etc. It is to be noted here that the error complained of was *duly assigned,* which would at least have as great an effect as if the court on its own motion should undertake to notice a plain error. It was held, however, that these questions could not be raised by the appellant, for the reason that no exception had been taken to the report of the master in the court below, and the lower court could not be convicted of an error in basing the decree upon those portions of the master's report to which no exception had been taken. The court said:

> These questions are not open to appellants in this court. The decree below followed the report of the special master. And that report was based, in part, upon statements drawn from the books of the parties by the accountants selected by them respectively. Those statements contained the undisputed and disputed items in separate columns. The defendants did not file with the master or in court any exceptions to the report. If the statements by the accountants, or the report of the special master, were based upon any particular interpretation of the articles of partnership that was prejudicial to the defendants, it was their right to file exceptions to the report. The master was directed to report all issues of fact made by the pleadings, and take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of the reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. *Having failed to do this, they cannot in this court for the first time object that the master proceeded upon erroneous views as to the contract be-*

tween the parties. (Equity Rule 83; *Brockett* v. *Brockett,* 3 How. 692; *McMicken* v. *Perrin,* 18 How. 504, 506; *Story* v. *Livingston,* 13 Pet. 359, 366; *Medsker* v. *Bonebrake,* 108 U. S. 66, 71).

It is to be noted that the case just cited was an appeal in a suit of equity, and that it invoked a trial *de novo* in the appellate court, which, as the Court of Appeals well says, entitles the appellant to a just decree, and that this court, instead of being called upon to notice a plain error, had before it a proper assignment of error made at the time the appeal was taken as required by law.

In *Coghlan* v. *South Carolina Railroad Co.,* 142 U. S. 101, 115, with which we think the decision of the Court of Appeals is in conflict, error was *duly assigned* that the lower court did not include interest for three periods of six months each. The court refused to consider the question, saying:

> Having failed to except to the report upon the ground that it did not include them, we do not think that the appellant should be now heard to urge this as an objection to the final decree.

The decision of the Court of Appeals is also in conflict with the case of *Topliff* v. *Topliff,* 145 U. S. 156. There an assignment of error properly raised the question of the inadequacy of damages awarded, but as no exceptions upon this ground were made in the court below to the master's report, this court declined to consider the question, saying, page 173:

> Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself or by a reference to the master for a correction of his report without putting the parties to the delay and expense of an appeal to this court. *It would be manifestly unjust if this court after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention and reverse the case upon that ground, when if exception had been duly taken the error could have been at once corrected.* There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to this first

report, which was set aside upon other grounds, or as already observed in the exceptions to his final report.

The decision of the Court of Appeals is also in conflict with two following decisions of courts of appeal of other circuits.

In *Provident Life & Trust Company* v. *Camden Railway Company*, Circuit Court of Appeals, Third Circuit, 177 Fed. 854, 859, the assignment of error properly made alleged that the principal sums evidenced by the bonds in question were not due and payable. It was held that although the error in the Court of Appeals was *properly assigned* (which would be at least equivalent to the action of the court in noticing a plain error), yet inasmuch as the particular complaint had not been presented to the lower court by the way of exceptions to the report of the master, the appellant could not be heard upon appeal. The court said:

> This was one of the matters specifically referred to the master to ascertain. The language of the order of reference in that respect has already been given. It will be recalled that he was "to ascertain and report what is now due and payable to the complainant, trustee, for principal and interest upon the two mortgages made to it by the defendant." Killion, although not entitled to be present and heard in view of the interlocutory decree standing against him, nevertheless attended before the master, was heard by him, and later was permitted to, and did, file exceptions to his report; but he did not except to the master's explicit finding that the principal and interest of the bonds were due. *Having failed to raise the question below, although given the opportunity, he ought not to be permitted to raise it for the first time on appeal,* and this irrespective of the fact of the decree *pro confesso* standing against him.

In *The City of New Orleans* v. *Fisher*, 91 Fed., 574, Circuit Court of Appeals, Fifth Circuit, it is held that questions concerning the correctness of the master's findings, which were not raised by proper exceptions to his report, could not be made the ground of assignments of error on the appeal. The court said, page 581, after setting out the *assignment of error*:

> The grounds stated in this assignment form no part of the exceptions filed to the master's report and it can hardly

be said that the judge below erred in this respect when his attention does not appear to have been called to it.

In *McMicken* v. *Perrin,* 18 How., 587, the court said:

> This court will *not* review a master's report upon objections taken here for the first time.

In Volume II, Street on Federal Equity Practice, Sec. 1476, it is said:

> As exceptions furnish an appropriate procedure for reviewing the master's report, so they supply the only means whereby defects of the kind now under consideration can be reached. Findings of the master on questions of fact are always binding where no exceptions are taken, or where they are improperly taken. Only such matters of *law* and of fact as are brought before the court by exceptions will be reviewed and the burden of sustaining the exceptions is on the objecting party.

Perhaps the best statement of the rule is contained in 17 Enc. Pl. & Prac., 1047, as follows:

> Upon the coming in of the master's report it will be received as true when no exception is taken thereto, and, if some exceptions are filed, the portions of the report not excepted to will be taken as correct, not only as regards the *principles* but as relates to the evidence upon which they are based. And of course exceptions to the report which are not presented upon the coming in of the report cannot be made on appeal.

The case under consideration furnishes an apt illustration of the necessity of the rule requiring exceptions to the findings of the master upon matters of *law* as well as upon matters of fact. The master's report comprised some five hundred pages, and contained a digest of thousands of pages of testimony and a consideration and determination of a multitude of legal propositions involved in this most complex and confusing litigation. Is the trial court expected to grope through this bewildering maze with a search warrant to find errors of which one or the other of the contending parties may complain? Should not the party dissatisfied with any particular finding of fact or conclusion of law be called upon to point it out to the court, and should not the court

be justified in assuming that such portions of the report as are not excepted to are acquiesced in by the contending parties. If one of the parties undertakes to file exceptions and to point out to the lower court his specific objections to the report and the court passes upon the exceptions filed. assuming, as he has a right to assume, that other portions of the report are acquiesced in, should not the parties upon appeal be confined to their exceptions thus taken in the lower court? If a party *purposely* and *intentionally* omits to except to a conclusion or finding of the master, should the lower court be required to grope through the master's report in order to pass upon the finding or conclusion against the *implied protest* of the interested party, and should an appellate court be at liberty to reverse the lower court if it fails so to do?

We do not believe that the case of *Sheffield Railway Company* v. *Gordon,* 151 U. S., 285, 293, was intended to modify the rule of the foregoing decisions of this court. There exceptions to the master's report had been filed. The court stated that there were *two difficulties in the way of considering the case upon these exceptions, first,* because the exceptions were too broad, and, *secondly,* because the master did not send up the entire evidence with his report, so that it was impossible to impeach his conclusions. It is true the Court says:

> It is true that if the report of the master is clearly erroneous in any particular, it is within the descretion of the court to correct the error, but we see no reason for exercising such discretion in this case.

The court had been speaking of the proper proceeding before the *master* and before the *lower court,* and it is quite probable that in the quotation above referred to the Court is speaking of the rule which should control the *lower court,* and not a rule which would be applicable in an appellate court. Particularly would this appear so in view of the fact that there is no reference to the line of authorities above referred to, holding in no uncertain terms, that no issue in a case heard before a master is presented in an appellate court, in the absence of an exception to the report pointing out the particular matter complained of, so that the master, the lower

court and opposing counsel may be advised in what particular the report is objectionable.

The ruling of the Court of Appeals works a great hardship in this case. The Belt Company and its receivers filed exceptions to the report of the master upon the issue of debt or no debt between the Belt Company and the Trust Company. The Southern Company and the Cambria Company also filed their exceptions (Rec. 1061). These exceptions were overruled by the lower court and the question of taking an appeal was then presented. The Trust Company's exceptions had only asserted that the master had erred in incorporating in his report any "reference to or recommendation concerning" the liability issue. Its assignment of error filed at the time of taking its appeal followed its exceptions to the master's report.

Under these circumstances the result of the Trust Company's appeal would necessarily be (a) either that the decree of the lower court holding that the Southern Company was not liable for the debt would be affirmed or (b) that that issue would be eliminated from the case. Under these circumstances, the Belt Company and its receiver, as well as the Southern Company and the Cambria Company, believing that the Trust Company, upon appeal, would be confined to the scope of its exceptions to the master's report and to its assignments of error, took no appeal upon the question of the existence or amount of indebtedness between the Belt Company and the Trust Company, or upon the other issues where the decision of the lower court was adverse to them. It was not until after the time for an appeal had elapsed that the Court of Appeals, in October, 1912, not only held that the liability issue could be considered by it, notwithstanding the state of the record, but also proceeded to decide that issue adversely to the petitioner. If it could have been anticipated that the liability issue would come before the Court of Appeals and be decided by it notwithstanding the condition of the record, the Belt Company and its receiver could then have taken their appeal from the accounting feature of the case, and could have had reviewed the findings of the master and the decree

of the lower court in that regard, with the possible result that the judgment involved herein might have been materially reduced, if not entirely eliminated, and the Southern Company and the Cambria Company could also have had reviewed the action of the lower court in overruling their exceptions.

Respectfully submitted,

SAMUEL UNTERMYER,

SAMUEL W. MOORE,

Solicitors for Petitioner.

No. [redacted].

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Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

GUARDIAN TRUST COMPANY, RESPONDENT.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

CENTRAL IMPROVEMENT COMPANY,
RESPONDENT.

BRIEF AND ARGUMENT OF GUARDIAN TRUST COMPANY IN OPPOSITION TO PETITION OF KANSAS CITY SOUTHERN RAILWAY COMPANY FOR CERTIORARI.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Respondent.

GEO. H. ENGLISH, JR.,
Of Counsel.

IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
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KANSAS CITY SOUTHERN RAILWAY COMPANY,
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CENTRAL IMPROVEMENT COMPANY,
RESPONDENT.

BRIEF AND ARGUMENT OF GUARDIAN TRUST COMPANY IN OPPOSITION TO PETITION OF KANSAS CITY SOUTHERN RAILWAY COMPANY FOR CERTIORARI.

One single question is presented by the present petition, namely, the correctness of the decision of t' e Circuit Court of Appeals of the Eighth Circuit upon the point that the Southern Company is liable for the debt of the Belt Company to the Trust Company. The validity of the Belt debt and the extent of the relief awarded the Trust Company are not drawn in question.

The facts upon which rest the liability of the Southern Company for the debts of the Belt Company are so admirably stated in the two opinions of the Court of Appeals, that to repeat them would be a waste of the time of this Court. The accuracy of the statement of the facts by the Court of Appeals is not challenged by the petitioner.

In order, however, to put into contrast with the actual situation the elaborate argument of petitioner which suppresses or ignores the facts upon which the opinion turns, it is deemed proper to describe briefly and without detail the essential outline of the controlling issue.

The Southern Company was organized pursuant to a reorganization plan which included the Belt Company, the Gulf Company and the Dock Company. The Belt Company owned or controlled the Kansas City terminals; the Dock Company owned or controlled the terminals at the Gulf of Mexico; and the Gulf Company owned or controlled the main line.

The Trust Company owned stock and bonds of all these companies and also held a large amount of the floating debt of all three companies. The present controversy relates solely to the floating debt of the Belt held by the Trust Company.

The Gulf became insolvent in 1899 and that year the reorganization was undertaken.

The scheme of reorganization was intended to accomplish the result of bringing all three railroad properties into one successor corporation, which corporation was to be named the Kansas City Southern Railway Company, which should own the fee title to all the properties and have but one class of incumbrance secured upon them all. This result was to be effectuated primarily by the exchange of stocks and bonds of the constituent companies for the stocks and bonds of the new company upon ratios prescribed in the plan, with an additional amount of new securities to be sold to provide for cash requirements of the new company. And after the acquirement of the stocks and bonds, the fee title to the properties was to be acquired by foreclosure of the mortgages or otherwise. In the case of the Belt Company the old bonds were to be exchanged for new bonds of the successor company, so that for each Belt bond the bondholder was to receive one and one-third bonds of the new company and also 25% in par value of shares of the preferred stock in the new company. The Belt stockholders were to receive share for share in the stock of the new company, one-fourth of the new shares to be preferred stock and three-fourths common stock.

Provision was also made for the unsecured creditors of the three companies. THE PLAN CONTAINED THE PROVISION THAT ONE OF THE OBJECTS TO BE ATTAINED BY

ITS EXECUTION WAS THE PAYMENT OF THE FLOATING DEBT. It is by ignoring and suppressing this fact that any semblance of plausibility is given to the petitioner's argument.

The plan was carried out in its entirety, the new securities were exchanged for the old, and the fee title from the Gulf and Belt Companies was acquired by the Southern Company, by foreclosure of the mortgages which foreclosures were, of course, purely formal and nominal since substantially all the bonds and stocks had been deposited under the plan, *and the entire floating debt of all the constituent companies was paid by the Reorganization Committee or by the Southern Company with the exception of the Trust Company's debt of substantially* $360,000 *which was not paid and is now repudiated by the Southern Company.* (Rec. 798, 799, 1183)

The present litigation was begun in 1900 by a creditor's bill by the Cambria Company, which sought to enjoin the Trust Company's sale of the collateral which it held as security for its debt upon the plea that a true accounting between the Trust Company and the Belt Company would wipe out the Trust Company's debt and leave a balance in favor of the Belt Company to which together with the collateral the Cambria Company asserted it was entitled; the accounting sought was obtained and in various ways was protracted until the final decree of the Circuit Court in the summer of 1910. The result of the accounting was the establishment of the validity of the *Belt* Company's debt to the Trust Company and the correctness of that decree is not now and has never been challenged.

It will thus be seen that the plan of reorganization was a just, honest and proper one in that it made adequate and fair provision for bondholder, creditor and stockholder and contained an express assurance to the creditors that their debts would be paid. When the validity of the Belt Company's debt to the Trust Company was finally established and payment was repudiated by the Southern Company, the Circuit Court of Appeals held that the Trust Company was entitled to equitable relief against the Southern Company, and for the cogent reasons set forth in the two opinions it held that the measure of that relief was the same and the equitable rights of the Trust Company were identical with those of a creditor whose rights had been ignored by a reorganization scheme which protected the interests of the stockholder at the expense of the creditor.

Since the decision of the Boyd case by this court (228 U. S. 482), and in the line of uniform holdings of this court from its origin to the present time, there can be no doubt of the correctness of the decision of the Court of Appeals.

For the convenience of the Court we file herewith printed copies of the two opinions of the Circuit Court of Appeals bound together. These opinions must, of course, be read together. It is submitted that they answer conclusively the arguments advanced by counsel for the petitioner which were put forth fully and completely in the court below.

COMMENT UPON THE PROPRIETY OF THE ISSUE OF THE WRIT OF CERTIORARI.

This protracted litigation has received the most careful attention of the Circuit Court of Appeals, and has been the occasion for rendering four separate and carefully considered opinions of that court. Two injunctions have been issued by the Circuit Court enjoining the prosecution by the Trust Company of suits in the state courts wherein the Trust Company sought to obtain personal judgment against the Southern Company for the Belt debts. One of these was upon dependent bill in the present litigation and one was upon dependent bill in a proceeding connected therewith—the Belt foreclosure suit. Both of these injunctions came before the Court of Appeals and both of them involved the consideration of the general subject of the litigation. They are reported in 171 Fed. 43 and 146 Fed. 337 respectively. The appeal from the final decree of the Circuit Court was the subject of a carefully considered opinion by the Court of Appeals (201 Fed. 826), but with due regard to the possibility of its own error, and at the earnest insistence of counsel for the Southern Company, the court permitted an extended and complete re-argument of the case covering every point now raised in the present petition, and rendered its final opinion in the litigation on December 2nd, 1913.

The petitioner has thus had the fullest and fairest of hearings upon every possible feature of the case by one of the ablest of the Circuit Courts of Appeal.

In respect to the reasons put forth for granting the petition, comment may be made as follows:

I.

No grave and serious questions affecting the rights of the petitioner are involved.

The court will not grant the certiorari merely because the judgment is for a large amount of money, especially since it has not denied that if the petitioner owes anything it owes the full amount.

There is no assertion either by counsel for the respondent or by the Court of Appeals, in its opinion, that the reorganization plan was fraudulent; on the contrary, the plan is conceded to be honest and fair upon its face, and the Trust Company is held to be entitled to the relief of one defrauded because in the *execution* of the plan its debt was not paid. There is nothing either grave, serious or novel in this view, nor is the comment of counsel for petitioner justified where it is stated that the Trust Company is permitted to claim under and against the same instrument.

The position of counsel for the petitioner that the Trust Company by becoming a party to the plan consented to the diversion, ignores the plain provisions of the plan and the settled principles of the law. The plan entitled the Trust Company to receive new securities in exchange for its old, and both the plan itself and the general law required that the Trust Company's debt be also paid. It is not conceived how the Trust Company's right to demand payment of its debt is at all impaired by its receipt of the securities of the new company.

II.

There was no solemn covenant by the trust company that it would not hold the Southern Company for the debt of the Belt Company.

The clause of the reorganization plan set forth in counsel's brief, as is so clearly pointed out by the Court of Appeals, cannot apply to the barring of the equities of the Trust Company. The construction sought to be placed upon this clause by counsel would

lead to a preposterous conclusion; for its effect would be to subject the Trust Company to a different ruling and more onerous conditions than those which would cover every other stockholder and bondholder of the consolidated companies. Such a construction would require the Trust Company to renounce and waive a just claim of $370,000 against the Belt Company as a right to its being permitted as a stockholder and bondholder of all the companies to becoming a party to such a plan and agreement. No other stockholder or bondholder was required to undergo such a penalty which would have required it to contribute not only from its share of the corporate assets as a stockholder but from its private and independent property to the payment of the creditors of the corporation. Such a construction would be nothing but absurd.

III.

The decision of the Circuit Court of Appeals does not lead to alarming and disastrous consequences.

(a) The Master did not find that the value of the Belt properties did not exceed the amount received at foreclosure sale. The Master found there was no evidence whatever of the fair market value (Record, page 991) but the Circuit Court of Appeals found convincing evidence, which is not even criticised, that the value of such properties received by the Belt stockholders far exceeded the amount of the Trust Company's debt.

(b) The assumption of counsel for the petitioner that a fair offer to the Trust Company would have meant dollar for dollar in stock for its debt, and the appeal to this Court to permit it to make such an offer at the present time, is ridiculous in view of the fact that the reorganization plan made express provision for creditors, not that they should receive stock *but that they should be paid, and the Reorganization Committee and the Southern Company acknowledged their obligation under this plan and under the law to pay the creditors by paying all of them in full except the Trust Company.*

IV.

The rulings of the Court of Appeals are in no wise in conflict with the rulings either of the Circuit Court of Appeals in other circuits or with the rulings of this court; on the contrary such rulings are completely in accord with the decision of this court.

(a) As respects the rulings of the Circuit Court of Appeals in regard to the properties of the Central Company, it will be found that they are amply supported by reason and authority. But even if the decision of the Court of Appeals was erroneous on this point still this court would not review the case for such error for the reason that the error would be wholly immaterial in view of the other conclusions reached by the court. If it be conceded that the Southern Company is liable for the debt for which the stock of the Central Company was pledged, it would clearly be entitled to no relief until it paid the debt, and hence the question of the Central Company lands are not in issue.

The technical point that this court should review the case because of the form of the exception to the Master's report, ignores the broad grounds upon which the Court of Appeals put its decision,—that an appeal in equity entitles the appellant to a trial *de novo* and to a just decree; that as this court said in *Sheffield* v. *Gordon*, 151 U. S. 285, if the report of the Master is clearly erroneous in any particular, it is within the discretion of the court to correct the error. But this court will not, under the great power herein invoked, which it exercises sparingly and reluctantly, review a mere matter of practice.

V.

No grave and serious questions affecting generally the reorganization of insolvent quasi public corporations are involved.

Of all the eight questions propounded by counsel for the petitioner upon pages 14 and 15 of their petition, scarcely one is necessarily involved in the present issues; scarcely one is in anywise affected by the decision of the Court of Appeals. Substantially all of them relate to what are properly matters of private contract between the parties interested. The decision of this Court in this case could not authoritatively answer any of these questions. For this court to attempt to answer these questions in the form in which they are put, would require it to go far beyond the mere decision of this case and perhaps to determine what contracts

people should or should not make, and necessitate its passing upon questions not in issue in this case at all.

It is true, as counsel state, that a number of *quasi* public corporations are in receivership in the Eighth Circuit. It is not true, however, that the questions involved in the present case are of such a character that this court can point out and provide for the details of reorganizations of them. The questions decided by the Circuit Court of Appeals are not novel. The decision consists merely in the application of the well established doctrine that any scheme or device whereby the interests of the stockholders are preserved at the expense of the creditors comes within judicial denunciation.

Courts of equity, in the exercise of their powers to relieve against fraud, have universally declined to define specifically that which is forbidden; to do so is to put a premium upon the ingenuity of those who seek to evade the law. And yet solicitors for the petitioner seek to move this court to do that very thing, and under the plea that the case is of grave public importance, propose a host of detailed questions, which, they say, should be answered authoritatively by this court in this case for a precedent to their proposed proceedings in other cases.

To grant the writ for this cause would, it seems to us, put bonds upon the free exercise of the powers of equity, which courts of conscience have always refused to submit to.

The public interest would be better conserved by the refusal than the granting of the writ. The wholesome and salutary general rules of conduct of reorganizations laid down by this court in the Boyd case and by the Court of Appeals in this case can harm no one if faithfully followed. There need be no sailing too close to the law.

Furthermore, as a practical consideration, it may be suggested that the issue of the writ would cause greater unsettling of conditions than its denial. Several of the receiverships mentioned by counsel, have already endured for a number of years, —notably the Wabash, The Metropolitan Company and the Mexico and Orient have been in the hands of the court for more than a year. Efforts towards reorganization have already been made in nearly all of them. Now, if this writ is granted, even with the magnificent progress that this court has made and will make in the dispatch of its business, it is unlikely that a final decision will be reached in less than two years. In the meanwhile, the reorganizations will be delayed, waiting upon the decision of this

court, the receiverships will be prolonged and the public, so far as it is dependent upon these corporations, will be for a long time disturbed.

Objections to the granting of the writ.

There are many reasons why this court should not grant the writ prayed for, aside from the reluctance with which this court exercises its power. As is obvious from the most cursory inspection of the record, the case discloses an almost unprecedented effort to avoid the plain requirements of the law and the payment of an honest debt.

Begun in the year 1900, the case has been pending during the fourteen years of the present century. Over 34,000 pages of testimony were taken in a long and complex accounting involving the validity of the debt of the Belt Company to the Trust Company. The most persistent efforts have been made by the Southern Company to escape liability for this debt, which is now conceded to be a just one. And the most ample opportunity has been sought and obtained by it for a complete hearing upon every possible phase of the case that could be imagined. A further hearing by this court and further delay for that purpose ought not, upon this record, be granted.

In reality the Southern Company has had its day in this Court. Counsel for the Southern, Mr. S. W. Moore, intervened in the hearing of the Boyd case and was permitted to and did file a brief therein as *amicus curiae*, presenting such questions as he deemed necessary in order to establish a precedent for the Circuit Court of Appeals in the present case. The re-argument of the present case in the Circuit Court of Appeals was granted in part upon counsel's representations that the Boyd case was pending before and would soon be decided by this court.

Therefore for the general considerations above mentioned, we urge most strongly upon this court its refusal to grant the petition and enter upon the review of the question so carefully considered by the Circuit Court of Appeals for the Eighth circuit.

Respectfully submitted,

Edward P. Gates,
Walter C. Clephane,
Solicitors for Respondent.

Geo. H. English, Jr.,
Of Counsel.

No. [redacted].

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

CENTRAL IMPROVEMENT COMPANY,
Respondent.

SUGGESTIONS OF GARDINER LATHROP AND ROBERT DUNLAP, AMICI CURIAE, UPON THE PETITION FOR CERTIORARI IN THE ABOVE CASES.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.

BLAKELY-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

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Respondent.

SUGGESTIONS OF GARDINER LATHROP AND ROBERT DUNLAP, AMICI CURIAE, UPON THE PETITION FOR CERTIORARI IN THE ABOVE CASES.

The undersigned practitioners in this Court, Gardiner Lathrop and Robert Dunlap of Chicago, present these suggestions, *amici curiae*, and thereupon they respectfully say:

1. The Atchison, Topeka and Santa Fe Railway Company, a corporation duly organized under the laws of Kansas, by a committee purchasing under a foreclosure

decree the railroad and other property of the Atchison, Topeka and Santa Fe Rail*road* Company, acquired its said railroad and other property under such foreclosure proceedings under a plan of reorganization between the bondholders whose mortgage was foreclosed and stockholders of the old corporation, the latter who participated therein paying a fixed assessment or sum to acquire stock in the new company, and thereupon the new company issued a large amount of its mortgage bonds and capital stock to the old bondholders, and to such stockholders of the old company as paid the required assessment. This took place in December, 1895, and the plan of reorganization was had in reliance upon the rulings of the federal courts then in force and its stocks and bonds have since been largely dealt with in the markets of the world and transferred to a vast number of purchasers in good faith.

2. Since the decision of this court in *Northern Pacific Railroad Company* v. *Boyd,* 228 U. S., 482, a number of suits have been instituted in various courts attacking the validity of reorganizations had a number of years ago and seeking to extend the principles of that case and the effect of that decision. Thus quite recently a suit has been instituted in the District Court of the United States for the Southern District of New York against the Atchison, Topeka and Santa Fe Railway Company for a large amount of money by a recent assignee of a holder of income bonds of the Atlantic & Pacific Railroad Company in which it is claimed, among other things, that in 1893 the Atchison, Topeka and Santa Fe Railroad Company controlling nearly all of the stock of the Atlantic and Pacific Railroad Company was placed in the hands of

receivers, and at the same time receivers were also appointed for the Atlantic and Pacific Railroad Company, and that proceedings were instituted to foreclose the first mortgage upon the Atlantic and Pacific Railroad Company, and a decree of foreclosure and sale was entered therein some time in 1896 when the new Atchison Company acquired all of the outstanding first mortgage bonds through the issuance of its own securities in payment therefor and then utilized such bonds to acquire all of the railroad and property of the Atlantic & Pacific Railroad Company at such foreclosure sale, and such income bondholder now seeks to hold the new Atchison Company liable for the face value of the income bonds and interest thereon since 1893 on account of some alleged misdoings or failures of the old Atchison Company in respect to its alleged dealings with the Atlantic and Pacific Railroad Company prior to the receivership.

3. That during said receivership from 1893 to 1896 the income bonds of the Atlantic and Pacific Railroad Company were only quoted in the market at about 2% of their face value, and after the foreclosure and sale of the Atlantic and Pacific Railroad they were only quoted at about a fraction of 1% of the face value. The principal of the income bonds matured but a few years ago and it is now sought to hold the new Atchison Company for the full face value of these bonds with all past interest.

4. We refrain from discussing or going into the merits of the controversy as that would not be now appropriate. Indeed we do not regard the decision of the Circuit Court of Appeals in the above entitled cases as at all appli-

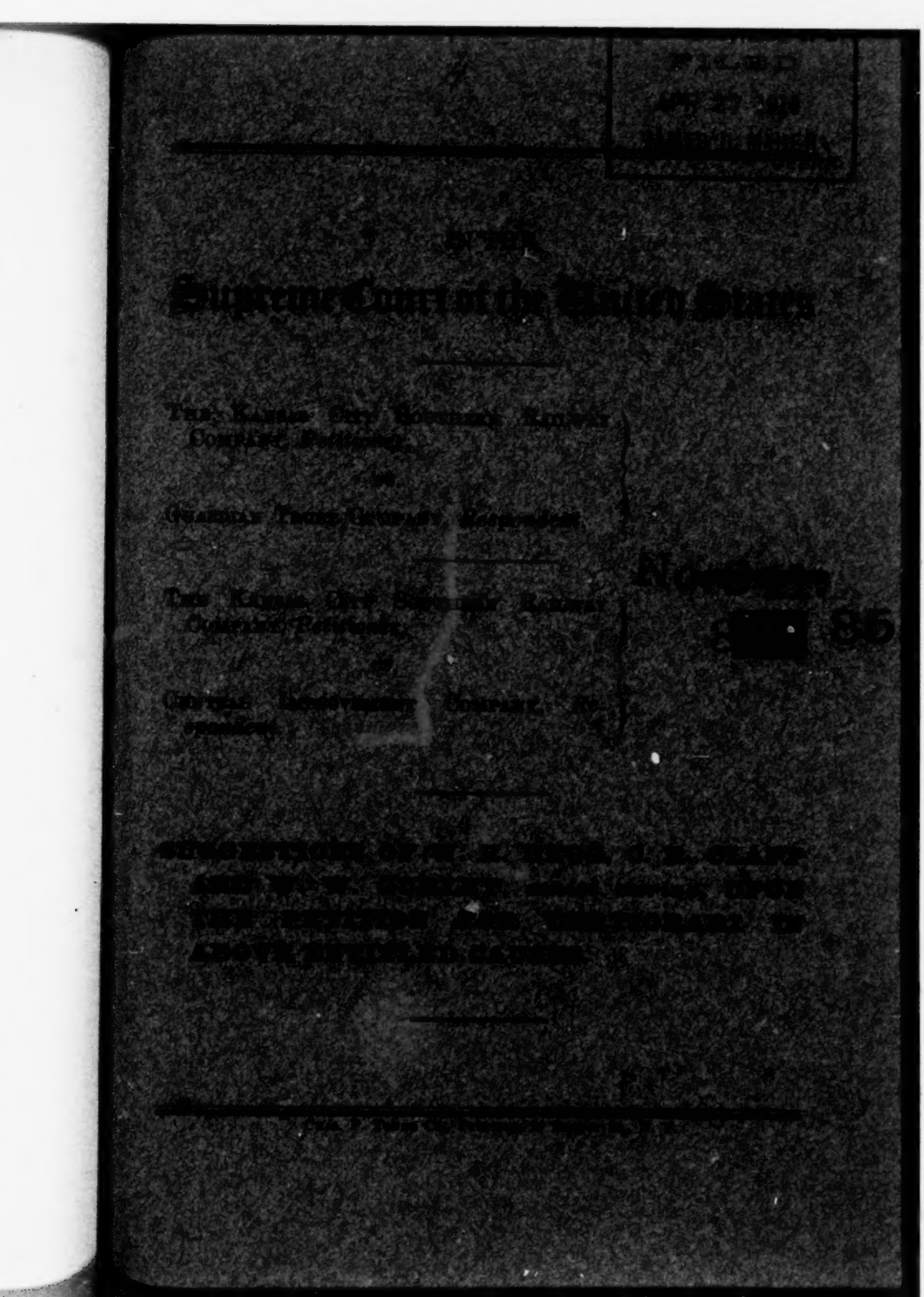
cable or pertinent to the merits of this controversy; nor do we believe that the Atchison reorganization can be successfully attacked, as was done in respect to the Northern Pacific reorganization, which was held to be invalid as to creditors in the Boyd case. We merely mention these matters for the sole purpose of calling attention to the fact that the disposition and opportunity exist to take the utmost advantage of any uncertainties as to the state of the law on these subjects. Therefore, we wish to impress upon the court that on account of such litigation, and that of a similar character, which is quite likely to increase within a very short time, the ruling of the Circuit Court of Appeals in the Guardian Trust Company case, which materially extends the force and effect of the judgment of this court in the Boyd case, should be now reviewed by this court in order that lower courts may fully understand the limits of the decision in the Boyd case. Unless that be done we may expect a flood of litigation over claims which for many years the holders thereof, as well as those who have acquired the securities of reorganized railways, believed to be utterly worthless and many of which claims are no longer in the hands of the original holders. We may also expect an application and extension by lower courts of the principles of the Boyd case not dreamed of by this court.

5. Should this court assume jurisdiction upon *certiorari* and review the ruling of the Circuit Court of Appeals in the Guardian Trust Company case we sincerely believe that much of the misunderstanding in respect to the scope and effect of the ruling of this court will be removed and that it is to the great interest of the public at large and for the protection of those purchasing

railroad securities that jurisdiction ought to be taken by this court so that many of the questions involved in the Guardian Trust Company litigation may be definitely settled.

Respectfully submitted,

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.



IN THE

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions of W. R. Begg, C. R. Clapp and W. W. Gurley, *amici curiae*, upon the petition for certiorari in above-entitled causes.

The undersigned, practitioners in this Court, Wm. R. Begg of New York, C. R. Clapp of Boston and W. W. Gurley of Chicago, present these suggestions, *amici curiae*, and thereupon they respectfully say:

1.—The Metropolitan Street Railway Company system at Kansas City, Missouri, is now in the hands of receivers in three consolidated causes pending in the District Court of the United States, for the Western Division of the Western District of Missouri, and the First Division of the District of Kansas. These consolidated causes consist of a creditors' and stockholders' bill and two bills to foreclose mortgages.

2.—The street railways have outstanding $12,752,000 in mortgage bonds held by the investing public, of which $7,492,000 are past due. They also have outstanding $14,221,043.00 mortgage bonds and notes which, with bonds and notes of the Kansas City Electric Light Company, aggregating $2,000,000, are deposited as collateral to the notes and bonds, aggregating $15,678,000 of a holding company known as the Kansas City Railway and Light Company, which are held by the investing public. The property of the latter company consists of the stocks and bonds of the street railway and electric light companies, against which it has issued its own bonds and notes, now past due, aggregating $15,678,000, and its own stock, aggregating $25,000,000.

3.—Three bondholders' committees have for some time been acting under the advice of their counsel, Byrne & Cutcheon, of New York, of which firm petitioner, W. R. Begg, is a member, and Ropes, Gray & Gorham, of Boston, of which firm petitioner, C. R. Clapp, is a member. These committees consist of:

(a) James J. Storrow and Daniel M. Wing, of Boston, and Frederick W. Stevens, of New York, being a committee for the issue of $7,242,000 of bonds of the Metropolitan Street Railway Company.

(b) James J. Storrow, of Boston, and Paul M. Warburg, John B. Dennis and Acosta Nichols, of New York, being a committee for $10,200,000 of bonds of the Kansas City Railway and Light Company, secured as hereinbefore stated.

(c) James J. Storrow, of Boston, Paul M. Warburg, John B. Dennis and Samuel L. Fuller, of New York, being a committee of the remainder of the bond or noteholders of said Railway & Light Company.

4.—There is also a stockholders' committee, consisting of George M. Reynolds, of Chicago, Oscar Fenley, of Louisville, George W. Bacon, of New York, and H. T. Abernathy, of Kansas City. Of this committee, petitioner W. W. Gurley is counsel.

5.—The opinion of this Court in *Northern Pacific R. Co.* v. *Boyd*, 228 U. S., 482, has been the subject of much discussion at the bar. It is essential that the street railway properties at Kansas City be reorganized and placed upon a sound financial basis. It is important that there be no doubt as to the legality of such reorganization. The question here involved seems to be such that a final decision thereof is essential to guide those engaged in such work. Petitioners therefore deem it proper to join, *amici curiae*, in this application for a certiorari, to the end that this court may de-

termine whether the doctrine laid down in its opinion in *Northern Pacific R. Co. v. Boyd*, 228 U. S., 482, applies to the extent decreed below.

WM. R. BEGG,
C. R. CLAPP,
W. W. GURLEY,
Petitioners.

No. [redacted].

Office Supreme Court, U. S.
FILED
APR 22 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

against

CENTRAL IMPROVEMENT COMPANY,
Respondent

Suggestions of Henry D. Estabrook, as amicus curiae, upon the petition for certiorari in the above cases.

HENRY D. ESTABROOK,
Solicitor, THE KANSAS CITY, MEXICO & ORIENT RY. CO.,
115 Broadway,
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions of Henry D. Estabrook, as amicus curiae, upon the petition for certiorari in the above cases.

The undersigned presents the following suggestions, as *amicus curiae*, and states:—

(1) The Kansas City, Mexico & Orient Railway Company is incorporated under the laws of the

State of Kansas, and on March 7, 1912, the Company was placed in the hands of Receivers, appointed in a cause instituted in and for the District of Kansas, Second Division. Ancillary proceedings are also pending in the United States District Court for the Western District of Oklahoma and the United States District Court for the Western District of Missouri, Western Division.

(2) The said Railway Company owns all the stock and bonds of The Kansas City, Mexico & Orient Railway Company, of Texas, a corporation organized under the laws of the State of Texas; and also all the bonds secured by the mortgage of The Kansas City, Mexico & Orient Railway Company upon the railway property in the Republic of Mexico.

The property of said Texas Company and the property in the Republic of Mexico are also in the hands of Receivers.

The capital stock of The Kansas City, Mexico & Orient Railway Company, of Kansas, consists of approximately $12,500,000 of Preferred Stock and $12,500,000 of Common Stock; and the bonded debt of the Company consists of approximately $24,000,000 of First Mortgage Bonds; and the Company has outstanding equipment trust obligations and a substantial amount of unsecured debts and claims. The secured and unsecured obligations of the Company are held by many different parties in the United States and foreign countries.

(3) The International Construction Company and Union Construction Company were heretofore engaged in constructing portions of the rail-

way constituting the line of The Kansas City, Mexico & Orient Railway Company in the United States and in the Republic of Mexico; and those Companies are now in the hands of Receivers; and it is claimed that The Kansas City, Mexico & Orient Railway Company (the Kansas corporation) is largely indebted to them.

(4) A Committee, representing the holders of the First Mortgage Bonds of The Kansas City, Mexico & Orient Railway Company, has been formed, for the purpose of protecting the interests of the bondholders in the proposed reorganization of the Company, for which Mr. Samuel Untermyer is counsel; and this Committee consists of:—

Lord Monson, Chairman,
Cecil Braithwaite,
Harry Bronner,
Granville Farquhar,
Frederick Hurdle,
William T. Kemper,
Willard V. King,
Leonor F. Loree,
Theodore P. Shonts,
E. D. Stair,
George A. Touche,
S. Davies Warfield.

A Committee of reorganization, representing the stockholders of the International Construction Company and of the Union Construction Company, has been constituted, for which Mr. B. S. Harmon is counsel, consisting of:—

John W. Platten, Chairman,
Alfred C. Bird,

Lewis L. Clark,
Carl Derenburg,
Frederick J. Lisman,
Jabez T. Odell,
J. Herndon Smith,
Philip D. Tuckett.

For some years past the undersigned has represented The Kansas City, Mexico & Orient Railway Company, and now represents the Company in the pending foreclosure proceedings.

(5) The Circuit Court of Appeals, for the Eighth Circuit, in its decision in the Guardian Trust case, has, it is respectfully submitted, announced rules of law and principles of equity governing the reorganization of insolvent corporations which not only constitute a wide departure from the decisions of this Court, but which involve the whole subject-matter in additional doubt and uncertainty.

Upwards of $24,000,000 of First Mortgage Bonds must be dealt with in the reorganization. There are also secured and unsecured debts and upwards of $25,000,000 of stock. Unless the stockholders can be invited to participate in a reorganization, based on the purchase of new securities for additional money, without having the reorganized company thereby assume payment of the debts of the old company, the reorganization will necessarily result in eliminating the stockholders. It is of the utmost importance to the interests of the stockholders that, before any such plan is promulgated, the law on this subject shall be definitely settled. In the event of the continuance of the present state of uncertainty, the

stockholders will in all probability lose all opportunity of participating in the reorganized company and the reorganization would have to take on the aspect of a strictly bondholders' reorganization.

(6) The decision of the Court of Appeals in the Guardian Trust case, it is respectfully submitted, is so in conflict with the ruling of this Court in the Northern Pacific Railway Company *v.* Boyd, 228 U. S. 482, as to fully justify the Court in bringing the case here for determination.

In the Boyd case this Court held that:—

> "Contracts for reorganization made between bondholders and stockholders of corporations, insolvent or financially embarrassed, involving the transfer of the corporate property to a new corporation, *while proper and binding as between the parties,* cannot, even when made in good faith, defeat the claim of *non-assenting creditors.*"

In that case the contract for the reorganization of the debtor corporation was held to be invalid as against Boyd, a "non-assenting creditor", who, as found by both the Circuit Court (170 Fed. 802) and the Circuit Court of Appeals (177 Fed. 824), was ignorant of the fact that stockholders were allowed to retain an interest in the reorganized company.

In the Guardian Trust case the reorganization of the debtor company is held to be invalid as against one who sustained to that company the dual relation of stockholder *and* creditor, and who not only was fully aware of the plan of reorganization but gave formal assent to it and participated in it, receiving, *and still holding,* his

proportion of the securities of the new company distributed under it.

The Circuit Court of Appeals rests its conclusion very largely upon the authority of this Court's decision in the Boyd case. We think it an unwarranted extension of the doctrine of that case, and that it should not be allowed by this Court to stand as sanctioned by it.

We believe that the questions involved in this application are grave and serious and of great public importance and present an appropriate occasion for the issue by this Court of its writ of certiorari.

HENRY D. ESTABROOK,
Solicitor, The Kansas City, Mexico & Orient Ry. Co.,
115 Broadway,
New York City.

IN THE

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

GUARDIAN TRUST COMPANY, RESPONDENT.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

CENTRAL IMPROVEMENT COMPANY, RESPONDENT.

Response of Guardian Trust Company to the Suggestions of Various Amici Curiæ.

There have been presented to this court suggestions by no less than five firms, committees, or associates, all urging the court to grant the writ of certiorari prayed for by the Southern Company. The ostensible ground for these suggestions is that the question presented by this petition is one of grave public importance.

There is ground for the belief that these suggestions emanate from counsel for the Southern Company, and hence do not, as they purport, evince a widespread and genuine public interest in the controversy. For instance, in respect to the suggestions of Gardiner Lathrop and

Robert Dunlap in behalf of the Atchison, Topeka and Santa Fe Railway Company, it may be noted that Mr. Lathrop is the partner of Mr. S. W. Moore, the attorney for the petitioner, under the firm name of Lathrop, Morrow, Fox & Moore. In respect to the suggestions of Henry D. Estabrook, in behalf of the Kansas City, Mexico and Orient Railway Company, that Messrs. S. W. Moore and Samuel Untermeyer, attorneys for the petitioner, are also attorneys for the receivers of the Orient; in respect to the suggestions of W. R. Begg, et al., in behalf of the Metropolitan Street Railway Company, that the same was furnished us and filed here by Mr. Frank Hagerman, general solicitor for the Metropolitan and also the solicitor of record for the Cambria Steel Company, the original complainant herein; that Mr. Samuel Untermeyer, one of the attorneys for the petitioner herein, is stated in the suggestions of Messrs. Joline, Larkins and Rathbone in behalf of the Wabash Pittsburgh Terminal Railway Company to be counsel for the committee representing the holders of the first mortgage bonds.

If the court should view these suggestions as the attempt of the Southern Company through the various relations which its solicitors bear to other railways, to emphasize its statement that the case is one presenting a question of grave public importance, nothing further need be said than that said by us in response to the argument made by the Southern Company through its solicitors. But, nevertheless, we venture the following in detailed response to them:

1. *The suggestions of Gardiner Lathrop and Robert Dunlap in behalf of the Atchison, Topeka and Santa Fe Railroad Company.* After mentioning a suit instituted against the Santa Fe Company, in respect to which it is stated that the *amici curiæ* do not regard the present decision of the Court of Appeals as at all applicable or

pertinent, the *amici curiæ* express the expectation of a flood of litigation over claims believed to be utterly worthless and an application and extension of the principles of the Boyd case "not dreamed of by this court." The fallacy so far as can be gathered from vague generalities, lies in two assumptions, namely, that the principles of the Boyd case are novel and that a decision of this case by this court could or would settle any misunderstandings of the scope and effect of the rulings of this court. As to the first, it is candidly submitted that there is nothing new in the Boyd case or in this case. The principles upon which the decision of both turned are older than this court, growing as they do out of the fundamental conception of a corporation. They have been applied by the court uniformly since its origin—witness the Howard case, the Monon case, the Louisville Trust Company case, and a host of cases cited by the Circuit Court of Appeals. Secondly, nowhere is there pointed out how the assumption of jurisdiction in this case will prevent misconception of the Boyd case. This case is stronger for the creditor than Boyd's case, for here there was the express assurance in the reorganization plan that the floating debts would be paid, while in Boyd's case there was none. Anything the court might say must be limited by this consideration and hence could not afford a precedent to other cases in which this element did not exist.

2. *The suggestions of Henry D. Estabrook in behalf of the Kansas City, Mexico and Orient.* The complaint seems to be that in the Orient reorganization it is desired to deal with the stockholders but to make no provision for creditors. Surely there is no need for making any other ruling on this question than that which this court has so often made. It would seem to the ordinary mind that this court and all the courts before whom the question has come, have declared the law with sufficient

simplicity. No scheme of reorganization by which the stockholders are permitted to retain an interest paramount to that of the creditors will receive judicial sanction. With this simple rule of honesty in mind the reorganizers of the Orient will have no difficulty in perfecting a valid reorganization. If they seek to swerve from it, they should seek in vain the aid of this court.

3. The suggestions of Henry S. Priest et al. in behalf of the St. Louis and San Francisco Railroad Company are not sufficiently definite to enable us to discern wherein their complaints lie. The statement is made generally that the decision of the Court of Appeals in this case gives the Boyd case a construction "which materially enlarges and extends the force and effect of the judgment of this court in the latter case." How the review of the present case can in anywise serve the reorganizers of the Frisco road is nowhere pointed out.

4. The same comment is justified in respect to the petition of Wm. R. Begg et al. in behalf of the Metropolitan Street Railway Company and of Kansas City. The suggestions do not embrace any discussion of any concrete question in anywise connected with the proposed reorganization of that company, and like those of the Frisco, amount to nothing more than the expression of dissatisfaction, in that the Court of Appeals has reiterated the simple rule that stockholders must not be preferred to creditors.

5. The suggestions of Joline, Larkin, and Rathbone in behalf of the Wabash Pittsburgh Terminal Railway Company assert that it is essential for those interested in the reorganization (which it seems has been in contemplation for at least six years), to know "whether creditors and security holders are entitled to participate in the reorganization as to a part of their claims and still hereafter assail its validity as to claims with respect to which they do not participate." We submit that the

answer to this query could not be announced in the instant case. **The trust company has not sought to nor has it been permitted to assail the reorganization.**

Without reiterating the points made in our response to the application of the Kansas City Southern Railway Company, we submit generally that every definite suggestion made by these numerous intervenors is either based upon a misconception of the plain and lucid opinions of the Court of Appeals and of this court or is fully answered by those opinions.

In conclusion and, we trust, with deference and due respect to the distinguished lawyers who have made the suggestions filed herein, we most earnestly protest against the practice resorted to in this case. To us it seems either a particularly determined attempt to induce this court to decide questions which are not in issue in this case so as to make precedents for other cases, or else an effort to make it appear that an extended demand exists for a review of the Boyd case.

When we consider that this litigation has been pending for fourteen years and that the Southern Company has so persistently delayed the final judgment as to call for the pointed statements of the undisputed facts made by the Court of Appeals (Second Opinion, pp. 25 and 26), we feel that the present suggestions should not be permitted to contribute to gaining for the Southern Company the further delay of a payment, so long withheld. Nor should the Trust Company's case, which so strongly appeals to a court of conscience, be made a moot case for the settling of various details of railway reorganizations.

Respectfully submitted.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Attorneys for Guardian Trust Company.

GEORGE H. ENGLISH, JR.,
Counsel.

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No. ~~941~~.

Office Supreme Court, U. S.
FILED
APR 27 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

No 941

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions ~~of Joline, Larkin & Rathbone~~, amici curiae, upon the petition for certiorari in the above cases.

Edward H. Larkin
Albert Rathbone

JOLINE, LARKIN & RATHBONE,
54 Wall St.
New York City.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions of Joline, Larkin & Rathbone, amici curiae, upon the petition for certiorari in the above cases.

The undersigned, as *amici curiae*, present their suggestions and respectfully state:

(1) The Wabash Pittsburgh Terminal Railway Company is a consolidated corporation, organized

under the laws of Pensylvania, Ohio and West Virginia. Since May 29, 1908, this Company has been in the hands of Receivers, appointed in a suit instituted in the United States Circuit Court at Pittsburgh.

(2) The Wabash Pittsburgh Terminal Railway Company owns 51.7% of the capital stock of the Wheeling & Lake Erie Railroad Company, which is a corporation organized under the laws of Ohio. This Company since June 8, 1908, has been in the hands of a Receiver appointed by the United States District Court at Toledo.

(3) The capital stock of the Wabash Pittsburgh Terminal Railway Company amounts to $10,000,000; and its bonded debt consists of $30,236,000 First Mortgage Bonds and $20,000,000 Second Mortgage Bonds; and the Company has a considerable amount of outstanding unsecured indebtedness.

The capital stock of the Wheeling & Lake Erie Railroad Company consists of $20,000,000 of Common Stock, $4,986,900 of Four Per Cent. Non-cumulative First Preferred Stock, and $11,993,500 of Four Per Cent. Non-cumulative Second Preferred Stock; the bonded debt consists of $2,000,000 Lake Erie Division First Gold 5s, $894,000 Wheeling Division First Gold 5s, $409,000 Extension and Improvement Gold 5s, $11,697,000 First Consolidated Gold 4s, $8,000,000 Three-Year Five Per Cent. Gold Notes; said Gold Notes being secured by $12,000,000 face value of General Mortgage Bonds, constituting part of an authorized issue of $35,000,000.

The Company also has several equipment trust obligations for a substantial amount and a considerable amount of outstanding unsecured in-

debtedness. Several million dollars of Receiver's Certificates have been issued.

The secured and unsecured obligations of both the Terminal Company and the Wheeling Company are held by many parties in various parts of the United States and foreign countries.

(4) Various Committees, representing Bondholders of the Wabash Pittsburgh Terminal Railway Company, have been formed, and for some time have been endeavoring, under the advice of their counsel, to protect the interests represented by them in the proposed reorganization. These Committees are made up as follows:

(a) A Committee, consisting of:

James N. Wallace, Chairman,
Haley Fiske,
Gordon Abbott,
George P. Butler,
Harry Bronner,
D. Crawford Clark,
Charles C. Jackson,
Asa S. Wing,

representing holders of First Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company. The undersigned are counsel for the above Committee.

(b) A Committee, consisting of:

James C. Chaplin, Chairman,
William R. Nicholson,
Clarence L. Harper,
Meigs H. Whaples,
Richard Sutro,

representing holders of First Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company, for which Mr. Samuel Untermyer is counsel; and

(c) A Committee, consisting of:

Alexander J. Hemphill, Chairman,
H. S. Redmond,
A. J. Miller,
A. H. Wiggin,

representing the holders of Second Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company, for which Messrs. Hornblower, Miller & Potter are counsel.

(5) These properties have been in the hands of the Court for the past six years. It is essential that they be speedily reorganized and that the reorganization shall be accomplished in a lawful manner. It is important that there be no doubt as to the legality of the reorganization or as to the validity of the securities which the reorganized company will issue, and that the creditors of the present companies shall not be permitted to assert their claims against the new company.

The decision of the Circuit Court of Appeals in the Guardian Trust case has greatly increased the difficulties of the situation. It is, we believe, an unwarranted extension of the rule of the Northern Pacific Railway *v.* Boyd, 228 U. S., 482. It is of the highest importance that these questions be settled by this Court. They are grave and serious questions. A vast number of persons are interested in their correct solution. Those interested in the reorganization are anxious to ascertain, and it is necessary for them to know, among other things,

whether creditors and securityholders are entitled to participate in the reorganization as to a part of their claims and still hereafter assail its validity as to claims with respect to which they do not participate.

Respectfully submitted,

JOLINE, LARKIN & RATHBONE,

54 Wall St.,
New York City.

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944.
Supreme Court, U. S.
FILED
APR 8 1914
JAMES D. MAHER
CLERK

Opinions

OF THE

Circuit Court of Appeals of the Eighth Circuit

IN

KANSAS CITY SOUTHERN RAILWAY COMPANY,

VS.

GUARDIAN TRUST COMPANY.

RENDERED

October 22, 1912, and December 2, 1913.

United States Circuit Court of Appeals.

EIGHTH CIRCUIT.

SEPTEMBER TERM, A. D. 1912.

NUMBER 3489.

Central Improvement Company, et al., Appellants,

vs.

Cambria Steel Company, et al., Appellees.

NUMBER 3490.

Guardian Trust Company, Appellant,

vs.

Cambria Steel Company, et al., Appellees.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Mr. George H. English, Jr., and Mr. Edward P. Gates (Mr. D. J. Haff and Mr. E. C. Meservey on brief), for appellants.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Before SANBORN, Circuit Judge, and MARSHALL and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge, delivered the opinion of the court.

While the parties to these controversies are numerous, the questions involved upon the appeal require consideration only of acts of the following named companies, to-wit: The Cambria Steel Company, which, for convenience, will herein be designated Cambria Company; Kansas City, Pittsburg & Gulf Railroad Company, herein called Gulf Company; Port

Arthur Channel & Dock Company, herein called the Dock Company; Kansas City Suburban Belt Railroad Company, herein called the Belt Company; Kansas City Southern Railway Company, herein called the Southern Company; Guardian Trust Company, herein called the Trust Company; The Provident Life & Trust Company, herein called Provident Company.

The Gulf Company was a railroad extending from Kansas City to Port Arthur on the Gulf of Mexico; the Dock Company was a local company having terminal facilities at Port Arthur; the Belt Company was a belt line railroad having terminal facilities at Kansas City, Missouri. Each of these companies had outstanding bonds secured by mortgages upon its properties. The Cambria Company was a judgment creditor of the Belt Company. The Trust Company owned a large amount of the stock and bonds of both the Gulf Company and the Belt Company and was also a creditor of the Belt Company. The Gulf Company, having defaulted in the payment of interest upon its mortgage, a suit for foreclosure was instituted, and a committee of bondholders was selected to originate and propose a reorganization plan. This committee proposed a plan of reorganization by which the properties of the Gulf Company, the Dock Company and the Belt Company should be acquired and organized into or operated as a single new company. This committee formulated a plan of reorganization, by the terms of which it was proposed that a new company be organized to acquire the properties of the three mentioned companies. Their plan was published and submitted to the bond and stockholders of each of the companies, the committee declaring that it had formulated and adopted said plan as the basis of the reorganization of the railroad system, having for its ultimate purpose the unification of the main line and terminals into one ownership and under one management; that such object was sought to be accom-

plished by having the Gulf Company, when reorganized, acquire the capital stock of the two other companies, namely, the Dock Company and the Belt Company, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Company and Dock Company by retiring the existing bonds, and issuing therefor new bonds, the basis of the plan being that the property of the existing Gulf Company should be sold in the foreclosure proceeding, purchased by the committee, and a successor company organized, to which the property so purchased should be conveyed, together with the stock and bonds of the Dock Company and the Belt Company. If sufficient of the stock and bonds of those companies should be deposited with the committee, in exchange for bonds and stock of the new company to be organized, then those properties to be acquired. By that plan it was said the following results would be obtained; the new company to be organized would own the property of the Gulf Company and also the bonds and capital stock of the Belt and Dock Companies, and thereby all three properties would be under one corporate ownership, management and control. Said stock and bonds so purchased of the Belt and Dock Companies to be pledged under the mortgage to be given by the company to be organized for the payment of (1) floating debts and existing car trust obligations; (2) adequate provision for working capital for future acquirements. It was also stated that it was contemplated that said reorganized or new company should issue $30,000,000 fifty-year three per cent gold bonds, $18,000,000 of the bonds to be used for the conversion of the bonds of the Gulf Company, $1,330,000 for the conversion of the old or existing bonds of the Belt Company, $817,500 new bonds for the old or existing bonds of the Dock Company, $3,000,000 of the new bonds to be sold for the necessary cash requirements of the new company, $3,802,500 to be reserved

for the future requirements of the new company, $3,050,000 of new bonds to be used in acquiring existing outstanding bonds of some other companies that were subsidiary companies of the Belt Company.

It was proposed in the plan that the holders of securities of the Gulf Company were to receive for their bonds seventy-five per cent in new bonds and fifty per cent in new preferred stock; the stockholders of the Gulf Company, upon paying $10.00 per share, were to receive one share of new common stock for each share of the old stock.

The bondholders of the Belt Company, for their old bonds, were to receive 133 per cent of new bonds and 25 per cent in new preferred stock; the stockholders of the Belt Company were to receive for each share one-quarter of a share of new preferred stock and three-quarters of a share of new common stock.

The bondholders of the Dock Company were to receive for their old bonds fifty per cent in new bonds, fifty per cent in new preferred stock, and fifty per cent in new common stock; the stockholders of the Dock Company, for each share of their stock, were to receive three-quarters of one share of new common stock.

The stock and securities of the respective companies were largely deposited according to the committee's plan. A decree was entered in the foreclosure against the Gulf Company on February 5, 1900, sale had and the property thereunder acquired by the Southern Company on March 19, 1900, the date on which it was organized and incorporated.

The Southern Company issued a new mortgage and bonds, also its stock, according to the terms of the reorganization plan, and such bonds and stock were exchanged for the bonds and stock of the old companies, the holders of which had deposited their bonds and stock in accordance with the proposed plan. The Trust Company accepted the plan and de-

posited its stock and bonds which it held of the Belt Company and received in new bonds and stock its proportionate amount under the reorganization agreement.

Although the Southern Company had acquired practically all of the bonds and stock of the Belt Company in exchange for its new bonds and stock in accordance with the reorganization plan and agreement, and acquired possession and control of the property of the Belt Company, the Provident Company, Trustee in the Belt mortgage, filed its bill of foreclosure and asked for the appointment of receivers. The Master's finding in this regard was as follows: "On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as Trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6th, 1901, and the sale on December 31, 1901, to the Southern Company." The Trust Company was a party to that foreclosure suit and before the decree was entered asked leave to file an amended supplemental answer, stating in effect that the reorganization plan had been promulgated in the interests of creditors of the Belt Company as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization committee having often promised to pay it until about the time of the institution of the foreclosure suit, and that the purpose of such suit was to vest in the Southern Company title to all the Belt Company property, free from the payment of that company's floating debt, which was a fraudulent purpose. It asked that the Southern Company be made a party to the cause, &c. The court denied the leave to file such answer but provided, however, as a condition of the denial that complainant (Provident Company) should, within five days thereafter, file a stipulation that the decree should be without prejudice to the claim of the Trust Com-

pany. The last paragraph of the foreclosure decree was as follows:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railroad Company, or that may hereafter be acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time of the alleged reorganization was undertaken."

On September 6th, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company and other companies, the object and purpose of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company as security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

In the suit brought by the Cambria Company issues were

joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was in November, 1900, referred to Hon. Shannon C. Douglass, as Special Master, to take the testimony &c. The hearing proceeded before the master and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its petition of intervention on the 27th day of that month, claiming that the various securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

The hearing before the Master extended over several years, upwards of 34,000 pages of testimony was taken, and the Master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the Master are conclusive upon the parties on this appeal.

The Master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The Master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of $639,658.86.

The Master found fully the facts as to the reorganization plan, the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock of those companies, in ex-

change for the bonds and stock of the respective companies held by them, as we have heretofore stated.

The Master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

The Trust Company filed exceptions to the report of the Master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the Master.

Various exceptions were also filed by the Central Improvement Company, one of the defendants in the action.

Subsequently, a hearing was had by the court upon the report of the Master and the exceptions thereto, the exceptions were overruled and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the Master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal.

The decree also provided that, it appearing that all costs incurred by the Cambria Company prior to November 20, 1901, had been paid by it, no further costs should be taxed against the Cambria Company, nor should any costs which had been paid by the Cambria Company be chargeable against any other parties to the action. The remaining costs were taxed by the court one-third against the Trust Company and two-thirds against the Belt Company, to be paid by the Belt Company and Southern Company.

The assignments of error relied upon in this court are:

1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

2nd. That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree.

3rd. That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

The principal question, and the one which involves the merits of the controversy, rests upon the correctness of the finding of non-liability upon the part of the Southern Company for the debt found due from the Belt Company to the Trust Company, for, as stated by counsel for the Southern Company in their brief:

"The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a disposition of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said in substance to the Southern Company—'Even though you may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness, and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness.'"

This contention that if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company that was a perfect defense to the intervening petition of the Southern Company is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust

Company and the Southern Company in this case which it was the duty of the master and the court below to consider and decide. The remarks of this court in *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, that "The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is not an issue and cannot be determined in this suit in equity," upon which counsel rely, must be construed, as must all opinions of the courts, in the light of the facts and the issue then in hand. The issue before the court in that case was whether the causes of action in the state court were so identical with the cause of action theretofore pending in the court below that an injunction should be issued to stay the prosecution of the actions in the state court. This court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the state court were purely *in personam* to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law and that the prosecutions of the actions at law in the state court constituted no interference with the suit in the court below. There was nothing in the decision in that case in conflict with the conclusion which has not been reached.

The master and the court below decided that the Southern Company was not indebted to the Trust Company for the indebtedness of the Belt Company to the latter. The Trust Company requests this court to review that decision upon the report of the master and contends that as a matter of law the Southern Company is so indebted upon the facts which the master finds. The Southern Company objects to this review on the ground that the only exception to the master's conclusion here and the only assignment of error in the affirm-

ance thereof by the court below was placed upon the ground that that issue was not judicable in this suit. But an appeal in a suit in equity invokes a trial *de novo* in the appellate court and entitles the appellant to a just decree. *Dozagiac Mfg. Co.* v. *Lochren*, 143 Fed. 211; *Blease* v. *Garlington*, 92 U. S. 1, 8, and under Rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. *United States* v. *Bernays*, 158 Fed. 792; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108; *United States* v. *Tennessee etc. R. R. Co.*, 176 U. S. 242, 256. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it though upon an erroneous ground, that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise and that a failure to review the legal conclusion below would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it.

It is claimed that the Southern Company is liable for the debt of the Belt Company to the Trust Company because it knowingly acquired the property of the Belt Company in the execution of a scheme to exclude the Trust Company's unsecured claim against the Belt Company for $639,685.86 from the benefit of the Belt Company's property and to apply that property by an exchange of stock and bonds and a mere formal and not actual foreclosure sale to the benefit of the stockholders of the Belt Company.

In *Louisville Trust Co.* v. *Louisville &c. Ry.*, 174 U. S. 674, which was an action brought by a creditor to set aside a sale under a foreclosure as being in fraud of its rights, for the reason that such foreclosure was had in the interests of the stockholders as well as the bondholders, Mr. Justice Brewer, rendering the opinion of the court, said:

"The questions of this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosure of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. * * *

"But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to the facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. * * *

"We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. * * *

"We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages

mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interest, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

A "transfer of property by a debtor with a reservation of an interest therein to himself" is always voidable by his creditors as against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of its property with a preservation of an interest in themselves is equally voidable against all who take the property with notice of their act. In *Montgomery-Webb Co. v. Dienelt*, 133 Pa. St. 585, 596, 19 Atl. 430, a new corporation was formed and part of its stock was issued to the stockholders and a part of it was issued to the creditors of an old corporation for their holdings, and all the property of the old corporation was transferred to the new corporation. A single creditor of the old

corporation assailed the transaction. The Supreme Court of Pennsylvania said:

"Under such circumstances they (the stockholders) were bound to take notice of the nature of the transaction and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of the creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all and the new stockholders were not innocent, for they knew, or were bound to take notice of the taint in their co-adventurer's title. We are of the opinion that as to the stockholders in the Aronia Company, this was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transfers void as against creditors, and that, as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles, they are settled and familiar."

In *Chicago, Rock Island & Pacific Ry. Co. v. Howard*, 74 U. S. 392, 409, the leading case upon this subject, where a foreclosure sale of the property of a corporation was made pursuant to an arrangement whereby 84 per cent of the purchase price was to go to its bondholders and 16 per cent to its stockholders, the Supreme Court said: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser, and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid." The facts and the ruling in that case are thus stated in the syllabus:

"A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent), and the stockholders of the company the residue of the proceeds—a fraction (16 per cent.) of the part of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on sale in open market did not bring near enough to pay even the mortgage debts; so that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878, 884, the Circuit Court of Appeals of the Fifth Circuit said:

"There is no substantial dispute that the appellee, Mary F. Paul, was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the 'overflow property,' all were in pursuance of a re-organization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new organization, Central of Georgia Rail-

way Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim."

Indeed, it is settled law, that "A reorganization of an insolvent railroad company by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid and renders the new company liable for the claims of such creditors." *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804; *Luedecke v. Des Moines Cabinet Co.*, 140 Ia. 223, 118 N. W. 456; *Hurd v. New York & Commercial Steam Laundry Co.*, 60 N. E. 327.

The case under consideration falls directly under this rule of law. A scheme was devised and proposed for the benefit of the stockholders and bondholders of the Belt Company, the Gulf Company, and the Dock Company, as the reorganization agreement reads: "For the reorganization of the Kansas City, Pittsburg & Gulf R. R. Co., and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Co. and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made, and is found to be practicable *either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations*, or in any other manner that may be deemed by said committee to be most practicable and feasible." That scheme was accepted, approved and executed by the stockholders and

bondholders of the Belt Company and by the Southern Company for their benefit to the exclusion of the Trust Company's unsecured claim from all benefit from the property of its debtor, the Belt Company. A new company, the Southern Company, was organized, the stockholders and bondholders of the old company, the Belt Company, in exchange for their stock and bonds were offered and took an interest in the new company, the stockholders took for their $4,700,000.00 of stock in the old company about $1,857,000.00 of the preferred stock and about $3,562,500.00 of the common stock of the Southern Company, in all about $5,419,500.00 in stock at its par value, and the bondholders took about $1,330,000.00 of the preferred stock and $250,000.00 of the bonds of the Southern Company, in all about $1,580,000.00 at their par value, for their $1,000,00.00 of bonds of the old Belt Company and after the new company had obtained in this way more than 89 per cent of the bonds and more than 97 per cent of the stock of the old company it purchased the property of the old company at a formal, but not an actual, foreclosure sale, made pursuant to this plan of reorganization at the instigation of the Southern Company as holder of 89 per cent of the bonds of the Belt Company and with its consent as holder of more than 97 per cent of the stock of the Belt Company. And what was the actual effect of this entire performance? The property of the Belt Company was transferred to a new company and its stockholders preserved for themselves an interest in that property. Before the transaction they had common stock of the Belt Company of the par value of $4,700,000.00 and the Belt Company owned its property, after the transaction the stockholders had preferred stock of the Southern Company of the par value of about $1,857,000.00 and common stock of that company of the par value of about $3,562,500.00 and the Southern Company owned the property of the Belt Company. But a sale or transfer by stockholders of the property of their corpora-

tion in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation and a purchaser who takes and converts such property to its own use with knowledge of the facts, becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted. The value of the property of the Belt Company so taken and converted by the Southern Company was many times the amount of the Belt Company's debt to the Trust Company. The conclusion is irresistible and the judgment of this court is that the Southern Company which, pursuant to this scheme and in its execution, purchased the Belt Company's property at the formal foreclosure sale with full knowledge of the scheme and of the fact that by its execution the stockholders of the Belt Company were appropriating to themselves the benefits of the property of the Belt Company which in law and in equity belonged to the unsecured creditors of that company, become legally liable to pay and is indebted to the Trust Company to the amount of the debt of the Belt Company to the Trust Company in the sum of $639,658.86 and interest from June 22, 1910, on $473,723.59 at the rate of 6 per cent per annum, on $46,565.76 at the rate of 7 per cent per annum and on $119,369.51 at the rate of 8 per cent per annum.

The contention of the Southern Company that the Trust Company is estopped from enforcing and collecting this claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which it owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance, it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the Belt Company, which that scheme

created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it, took that property in trust for the unsecured creditors of those companies. That plan expressly set apart $475,000.00 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge and that it actually expended $1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee. The Trust Company never represented that it would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

Another objection to the enforcement of this claim is that the Trust Company was guilty of laches. There is nothing in the record to indicate that the Southern Company did not intend to pay the debts of the Belt Company until the foreclosure proceeding was brought by the Provident Company. As stated, the Trust Company interposed its claim in that action and the decree provided that its rights respecting the enforcement of such claim should remain unaffected. When the Southern Company filed its petition of intervention in the case brought by the Cambria Company, the Trust Company promptly asserted in defense thereto the liability of the Southern Company. The Trust Company also brought an action in the state court against the Southern Company for a part of its claim, for the reasons which it had before asserted. The

Southern Company filed its supplemental bill and obtained an injunction against the prosecution of the action in the state court, which was reversed by this court. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337. The Trust Company then brought a second action in the state court for another portion of its claim. The Southern Company moved the state court to stay the action, which motion was denied. It then filed another bill for an injunction against the Trust Company to prevent the prosecution of these actions, and the circuit court granted a preliminary injunction, which was reversed by this court. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43. Under these circumstances, the plea of laches is unfounded.

Again, the issue of the liability of the Southern Company to the Trust Company for the debt of the Belt Company to it came into this case as an equitable defense to the intervening petition of the Southern Company of February 27, 1905, wherein it sought to appropriate to itself property of the Central Improvement Company, 1120/1407ths of the shares of the stock of which company had been pledged to the Trust Company by the Belt Company to secure $203,900.00 of the debt of the latter company to the former. The Southern Company endeavored to appropriate this property of the Central Company under the after-acquired clauses of the old foreclosed mortgages of the Belt Company, the Air Line Company and the Gulf Company. The Trust Company answered (1) that the Southern Company owed it this debt, that he who seeks equity must do equity, that the Southern Company was entitled to no relief until it paid this debt, and (2) that by virtue of the pledged stock of the Central Company to secure the payment of the debt of the Belt Company its equitable right to the property of that company was superior to that of the Southern Company. The Trust Company was guilty of no fatal laches here because it held the majority of the stock of

the Central Company and that company held the title to the property which the Southern Company sought to take, so that the Trust Company had a perfect legal right by virtue of its stock to appropriate the property to the payment of its debt and it needed no affirmative relief, and a court of chancery will, and it is its duty to, condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the latter ought in equity and good conscience to pay, although on account of the statute of limitations, or for some other reason, the defendant might not be able affirmatively to enforce it. *Farmers' Loan & Trust Co.* v. *Denver, L. & G. R. Co.*, 126 Fed. 46, 51, 60 C. C. A. 588, 593; *Pomeroy's Eq. Jur.* Secs. 386, 393, note 4; *Brent* v. *Bank of Washington*, 10 Pet. 596; *De Walsh* v. *Braman*, 160 Ill. 415, 43 N. E. 597, 600; *Farmers' Bank* v. *Eglehart*, 6 Gill., 50, 57; *Fiezel* v. *Zuber*, 67 Tex. 279, 280, 3 S. W. 273; *Booth* v. *Hoskins* 75 Cal. 271, 275, 276, 17 Pac. 225; *De Cazara* v. *Orena*, 80 Cal. 132, 134, 22 Pac. 74; *Hall* v. *Arnott*, 80 Cal. 348, 354, 22 Pac. 200; *Grant* v. *Burr*, 54 Cal. 298 301; *McKeen* v. *James* (Tex. Civ. App.) 23 S. W. 460, 464; *Rodriguez* v. *Haynes*, 76 Tex. 225, 232, 13 S. W. 296; *Hartranft's Estate*, 153 Pa. 530, 533, 26 Atl. 104; 19 *Am. & Eng. Enc. of Law* (2d Ed.) pp. 177, 178; *Dimick* v. *Grand Island Banking Co.*, 37 Neb. 394, 399, 55 N. W. 1066; *Gage* v. *Riverside Trust Co.*, (C. C.) 86 Fed. 984, 998; *Whitmore* v. *Savings Union*, 50 Cal. 145, 150; *Specf* v. *Specf*, 88 Cal. 437, 444, 26 Pac. 203, 13 L. R. A. 137.

It is insisted upon the part of the Southern Company that the reference to a Master was by consent of parties and hence, that the findings of the Master are not subject to review. We do not think the record supports the statement that the Master was appointed by consent of parties. As before stated, the Cambria Company filed its bill September 6, 1900, and the record shows that, on the 7th of November, defendant having

answered, the case was referred by the court upon its own motion to Shannon C. Douglass. On February 27, 1905, a stipulation was filed by the parties to the effect that the Southern Railway Company might become a party to the action either by joint complaint or by bill of intervention, as it might elect, and file its bill, asserting its claim, on or before February 25, 1905; that the adverse party should have ten days thereafter in which to plead and that the testimony theretofore taken should be applicable as evidence in support of and in resistance of the Southern Company's claim; "that such orders of court as may be necessary for the purpose may be entered carrying into effect this stipulation." In accordance with this stipulation, the court made an order, permitting the Southern Company to file its bill of intervention, and gave the adverse party ten days in which to plead to the same, referring the issues to Shannon C. Douglass to take the testimony thereon and report, &c. This stipulation was not a stipulation consenting to the appointment of a Master but was simply one which authorized the court to make the necessary orders relative to permitting the Southern Company to intervene, and fixing the time within which the parties should plead thereto and an order that the testimony theretofore taken should be treated and considered as testimony relative to the issues made by the Southern Company's bill of intervention. The reference to the Master was by the court upon its own motion. The court would naturally refer that issue to the Master who had theretofore been appointed by the court on its own motion to hear the case. Subsequently, on the 1st of May, 1905, the parties stipulated that the Southern Company might amend its intervening petition, setting up, in addition to the matters contained in its intervening petition on file, a claim against the Trust Company for an alleged breach of trust, and consented in the stipulation that such new issue should be referred to Shannon C. Douglass, the Special Master, and the court,

pursuant to the stipulation, made an order permitting the Southern Company to file its amended intervening petition in that respect, and referred it to Shannon C. Douglass. It is this last stipulation and this order of the court upon which the Southern Company bases its argument that the reference of the case to the Master was by consent of parties. As before stated, the main issues, and the issues involved on this appeal, had been referred to the Master by the court upon its own motion. The stipulation that the new issue made by the amended intervening petition should be referred to the Master was a stipulation with reference to that issue, that issue was decided by the Master in favor of the Trust Company, and is not before us for review. So the case is not one where the issues involved have been heard by a master appointed by consent of the parties. Even though the original appointment of the Master had been by consent of parties, a reference under those circumstances would not preclude the court from correcting manifest errors of law made by the Master. Rule 11 of this court. *United States* v. *Tennessee & Coosa R. R. Co.*, 176 U. S. 242-256; *Clyatt* v. *United States*, 197 U. S. 207, 222; *United States* v. *Bernays*, 158 Fed. 792; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108.

The Central Improvement Company has made application to dismiss its appeal. It is not very material to the disposition of this case and to the adjudication of all the rights of the parties to this suit whether the application is granted or denied because the Trust Company had such an equitable interest in the property of the Central Company by virtue of the pledge to it of 1120 out of the 1407 shares of the stock of that company issued that the Trust Company's appeal completely challenges the decree of the court with reference to that property and furnishes ample warrant for its review and reversal. The Central Company has no property of substantial value except that specified in the decree. It is a mere

holding company either for the Trust Company or for the Southern Company and the determination of their respective equities necessarily determines the rights of the Central Company and the ownership of the beneficial interest in its property, and the motion to dismiss its appeal is denied.

The result is that the Southern Company is entitled to no relief in this suit unless it first pays to the Trust Company the amount of the Belt Company's debt to it and the costs of this suit because it became indebted to the Trust Company in the amount of that debt by its acquisition of the property of the Belt Company under the reorganization scheme with full knowledge that the stockholders of the Belt Company thereby preserved for themselves an interest in that property to the exclusion of the Trust Company, a creditor of that corporation.

Moreover, if the Southern Company were not equitably estopped from recovering the property of the Central Company by its indebtedness to the Trust Company, nevertheless, equity would require it to pay to that company the value of the latter's 1120 pledged shares of the stock of the Central Company before it would permit it to take the property of the latter company and thus to destroy the value of its stock through its claim as a purchaser at foreclosure sales under the after-acquired clauses of the old mortgages of the Gulf Company, the Air Line Company and the Belt Company. The property in controversy is the remnant of numerous pieces of real estate to which the Central Company took title and for the purchase prices of which it issued its stock at par to the Gulf Company, the Belt Company and the Air Line Company respectively, which companies paid the par value of that stock either to it or to the vendors from whom the property was bought. The result was that the Central Company, a corporation, owned and held the property in trust to pay the stockholders the par value of its stock which was the purchase

price of the property. In this state of the case the Belt Company, which acquired 1120 of the 1407 shares of the stock thus issued by the Central Company, pledged this stock in the year 1899 to the Trust Company to secure the payment of $203,900.00 of its debt to that company and the title and rights of the parties stood thus unquestioned from 1899 until 1905, when the Southern Company filed its intervening petition in this case. It asserted that the Central Company held this property in trust for the mortgagor companies and that the after-acquired clauses of their mortgages carried it to itself, the purchaser at the foreclosure sales thereunder. Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained. The after-acquired clause of a mortgage attaches to the interest acquired by the mortgagor only and it is always subject and inferior to junior liens, incumbrances and equities under which the property comes to the mortgagor. *Farmers' Loan & Trust Co.* v. *Denver L. & G. R. Co.*, 126 Fed. 46, 49, 60 C. C. A. 588, 591; *United States* v. *New Orleans R. R. Co.*, 12 Wall. 362; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414, 423. In a simple case the justice and the application of this rule is plain. A railroad company makes a mortgage of its property with an after-acquired clause. It subsequently purchases a piece of property and gives its note and mortgage for the purchase price and the vendor sells or pledges the note to a third person to secure his debt. The mortgagee of the railroad may not deprive the pledgee of the note of the property which secures it under the after-acquired clause of his mortgage until he pays the junior note and mortgage and this because he has given nothing for this property which the junior mortgagee and his pledgee have parted with value for their security upon it. In the case in hand, the Central Company acquired the property here in dis-

pute for its liability to pay to its stockholders the par value of its stock and it held the property in trust to secure the payment to its stockholders of that liability. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The fact that the mortgagor companies originally took and held the stock of the Central Company before the Belt Company pledged it to the Trust Company, has not been overlooked. That fact, however, only clearly fixes the legal rights and equities of the parties, fixes the title to the land in the Central Company and estops the mortgagor companies and all claiming under them from denying that the stock which they took and sold or pledged constituted the primary liability of the Central Company and the primary equity in the property it holds as against the mortgagees of the railroad companies and the purchaser thereunder. *Watson* v. *Bonfils*, 116 Fed. 157, 163, 166, 167, 53 C. C. A. 535, 541, 544, 545.

The stock of the Central Company was not the property of that company. It was a liability of that company. Conceding that the after-acquired clauses of the mortgages conveyed the Central Company's interest in this land subject to its primary trust to pay this liability they did not convey its liability, or the stock which represented it. *Humphreys* v. *McKissock*, 140 U. S. 304, 314. The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price

of the property, had been represented by its promissory notes and a mortgage upon this land to secure them and they had been pledged by their owners to secure their debt to the Trust Company. The Trust Company, which holds 1120 shares of the stock of the Central Company to secure a debt to it of more than $200,000.00, has an equitable interest in the land of the Central Company superior to that of the Southern Company and the latter is entitled to no relief with reference to this property until it pays to the Trust Company the value of that stock.

The controlling equities of this case require that the decree below should be so modified, among other things, that it will adjudge that the Southern Company is indebted to the Trust Company in the amount which the Belt Company owes it, that is to say, in the sum of $639,658.86 and interest thereon from the date of the original decree, and that no relief be granted to the Southern Company unless that debt is paid.

Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company, and its counsel, have filed a petition for leave to present the suggestion, that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. There is no prayer for this specific relief in any of the pleadings of the Trust Company but it is relief to which, under the law and upon the facts now found, the Trust Company is clearly entitled from this, or some other court, and in its answer to one of the numerous bills filed in this case it prayed for such other and further relief as should seem meet and just in the premises. The facts that the Southern Company voluntarily inter-

vened in this suit in 1905 and sought to take from the Trust Company the security for its claim furnished by the stock of the Central Company and by a large amount of other stocks, bonds and property, to which the Southern Company was not entitled, that this attempt of the Southern Company called into this suit the Trust Company's claim that the Southern Company owed it the amount of the debt of the Belt Company, that the Trust Company tendered that issue in actions at law which it brought as long ago as 1905 and 1906, against the Southern Company in a state court to recover from it this very indebtedness, that the Southern Company delayed and prevented the trial of that issue in those actions at law by means of two successive injunctions which it obtained from the court below, on the ground that this issue was pending in this suit, injunctions which on appeal this court promptly dissolved, *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, that this suit has been thoroughly litigated by all parties interested in it for more than six years, that tens of thousands of pages of evidence have been taken in this litigation and that further litigation in the state court over this issue, although it becomes *res adjudicata* by this decision, may by appeal or otherwise result in further delay, cause this suggestion of these stockholders to challenge serious consideration. It seems that if by the amendment of any of the pleadings of the Trust Company, or by the filing by it of a cross-bill, or a supplemental bill, or without them, such a decree as suggested may be lawfully rendered, justice and equity would require that that course should be pursued. The three stockholders are accordingly permitted to file their suggestion and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or

in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration. But whatever may be the result of that consideration, the decree below must be reversed and this case must be remanded to the court below with instructions to render a decree which shall contain the first five paragraphs of the decree below, shall adjudge that the equitable claim of the Trust Company, by virtue of the pledge to it of 1120 shares of the stock of the Central Company, in the property of that company described in the sixth paragraph of that decree, is superior to the claim and equity of the Southern Company therein, that the Southern Company is indebted to the Trust Company in the amount of the indebtedness of the Belt Company to that company, that is to say, in the sum of $639,658.86 and interest from the date of the original decree below, on $473,723.59 at 6 per cent per annum, on $46,565.76 at 7 per cent per annum and on $119,369.51 at 8 per cent per annum, that the Southern Company must pay this debt as a condition of obtaining any relief in this suit, that the ninth, tenth, eleventh and thirteenth paragraphs of the original decree be again adjudged and that the Trust Company recover its entire costs of the Southern Company and the Cambria Company, and that the share of such costs as between themselves, but not as against the Trust Company, that shall be paid by the Cambria Company and the Southern Company shall be determined by the court below as to it may seem just and equitable.

Filed October 22, 1912.

A true copy.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Seal)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 3489.—December Term, A. D. 1913.

Central Improvement Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.—December Term, A. D. 1913.

Guardian Trust Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before Sanborn, Circuit Judge, and Marshall and William H. Munger, District Judges.

Per Curiam:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Company,

deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southern Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 120 C.C.A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion, "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A consideration

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after argument of all the facts relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. *Burns* v. *Rosenstein*, 135 U. S. 449; *Provident Life & Trust Co.* v. *Railway Co.*, 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc. Ry. Co.* v. *Gordon*, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estoppel from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. *Clark* v. *Clark*, 62 N. H. 267, 272; *Hardin* v. *Boyd*, 113 U. S. 756; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 414, 415, 416; *Bradford* v. *Bank*, 13 How. 56, 69, 70; *Walden* v. *Bodley*, 14 Pet. 156, 164; *Moran* v. *Hagerman*, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial *de novo* the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is the appel-

lant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 40 Fed. 476, 477; *Burke* v. *Davis*, 81 Fed. 907, 910, 26 C. C. A. 675, 678; *Haymond* v. *Murphy*, 64 S. E. (W. V.) 855, 857; *Hayes* v. *Hammond*, 44 N. E. (Ill.) 422, 423; *Hurd* v. *Goodrich*, 59 Ill. 450, 456; *Von Tobel* v. *Ostrander*, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000 par value of the stock of that company about

$1,187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750,000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." *Northern Pacific Ry. Co.* v. *Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 456, 140 Ia. 223; *Hurd* v. *New York & Commercial Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the

creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville etc. Ry. Co.*, 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the Belt Company on the same day to the appoint-

ment of receivers of its property, its answer on October 19, 1901, admitting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the

Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Trust company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of

the Belt Company, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its cestuis que trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained, that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plant of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid," 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1909. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

(3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of nulla bona to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adjudicated. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313, 325; *Ward* v. *Todd*, 103 U. S. 327, 329; *In re Blake*, 150 Fed. 279, 283, 80 C. C. A. 167, 173; *United States* v. *Standard Oil Company*, 152 Fed. 290, 296; *Campbell* v. *Golden Cycle Mining Co.*, 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was greater

than that of the former stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law. *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 878, 882, 884; *Luedecke* v. *Des Moines Cabinent Co.*, 118 N. W. 456; 457; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is founded on

the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. *Ervin* v. *Oregon Railway & Navigation Co.*, 27 Fed. 625, 633; *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that the new bonds drew

but three per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company.

But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508; *Rankin* v. *Gardner*, 34 Atl. (N. J. Eq.) 935, 937; *Garrison* v. *Monaghan*, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on the

ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3 1/3 percent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3 1/3 per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333; *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 457, 458; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this posi-

tion and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." *Clements* v. *Moore*, 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme court held that Moore was liable to the creditor Clements for that amount. By the same mark the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure

the property of the Belt Company and divert it from its creditors. *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. *Railroad Company* v. *Soutter*, 80 U. S. 517, 522, 524; *Guckenheimer* v. *Angevine*, 81 N. Y. 394, 397; *Goble* v. *O'Connor*, 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; *Doherty* v. *Holliday*, 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; *Jones* v. *Reeder*, 22 Ind. 111; *Swinford* v. *Rogers*, 23 Cal. 234, 237; *Mason* v. *Pierron*, 34 N. W. (Wis.) 921, 925; *Blair* v. *Smith*, 15 N. E. (Ind.) 817, 819, 820; *Williamson* v. *Williams*, 11 Lea 355; *Murtha* v. *Curley*, 90 N. Y. 372; *Post* v. *Stiger*, 29 N. J. Eq. 554, 561; *Chamberlin* v. *Jones*, 16 N. E. (Ind.) 178, 179; *Muskegon Valley Furniture Co.* v. *Phillips*, 21 So. (Ala.) 822, 823; *Coale* v. *Moline*

Plow Co., 25 N. E. (Ill.) 1016, 1018; *Dilworth* v. *Curts*, 29 N. E. (Ill.) 861, 864; *Hulley* v. *Chedic*, 36 Pac. 783, 786; *Morrell* v. *Miller*, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing." (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to execute a plan, which

it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. *Cole* v. *German Savings & Loan Co.*, 124 Fed. 113, 119, 59 C. C. A. 593, 599; *Little Rock & M. R. Co.*, v. *Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650; *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 247; *American Bridge Co.* v. *Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (a) the placing of the properties of the Belt Company, the Gulf Company

and the Dock Company under one corporate ownership, management and control, "(b) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * * any holder of any claims whatsoever against the said companies, * * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the cestui que trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contract. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his

benefit the property, money or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to adjust

or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stocks and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company the agent of the Southern Company which held 97 per cent of its stock, recovered a judgment and obtained a return a nulla bona to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company

to enjoin the latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pleading of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. The issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of

the Belt Company by the Southern Company and its purpose to waive all defenses and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1900, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 17, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the property of the

Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the state

court to stay the proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim in a cross bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment. Nov-

ember 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,-972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in pais are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; *Illinois Trust & Sav. Bank* v. *City of Arkansas City*, 76 Fed. 271, 293; 22 C. C. A. 171, 193; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 396, 397; *New York Life Ins. Co.* v. *McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it would

not press it for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not then been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that Company, and the answers of the Belt Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern Company nor any

of its bondholders, or stockholders were without equal means of knowledge nor without notice under the law that the transfer of th. property of the Belt Company to the Southern Company without offering to pay or paying anything to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the others holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the wrongful appro-

priation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

(6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Southern Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Southern Company is entitled. *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 413.

416; *Hardin* v. *Boyd,* 113 U. S. 756; *Clark* v. *Clark,* 62 N. H. 267, 272; *Trimble* v. *Bank,* 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. *Bradford* v. *Union Bank of Tennessee,* 13 How. 56, 68, 69; *Walden* v. *Bodley,* 14 Pet. 156, 164; *Moran* v. *Hagerman,* 64 Fed. 499, 503, 504; *Wyatt* v. *Sweet,* 12 N. W. (Mich.) 692, 693. In *Walden* v. *Bodley,* 14 Pet. at page 164, the Supreme court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorneys' fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a

further decree in favor of the Trust Company and against the southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, should adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $19,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right, to the ex-

tent necessary to pay that debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of the 1120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right title, claim and equity of the Southern Company therein, that in case the Southern Company fails to pay its debt to the Trust Company by a day to be named by the court in the decree, the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, or such part thereof as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto, that on the demand of the master the Southern Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the former decree be reversed and the case be remanded to the district court for further proceedings in accord with the views expressed in this opinion.

Filed December 2, 1913.

A true copy.

Attest:
(Seal)

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

POOR COPY

No. 941.

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United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 3489.—DECEMBER TERM, A. D. 1913.

Central Improvement Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.—DECEMBER TERM, A. D. 1913.

Guardian Trust Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.
Mr. Frank Hagerman, for Cambria Steel Company,
Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.
Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

PER CURIAM:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the

Belt Company, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southrn Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued, counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion, "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A consideration after argument of all the facts

relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. *Burns* v. *Rosenstein*, 135 U. S. 449; *Provident Life & Trust Co.* v. *Railway Co.*, 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc. Ry. Co.* v. *Gordon*, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estopped from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. *Clark* v. *Clark*, 62 N. H. 267, 272; *Hardin* v. *Boyd*, 113 U. S. 756; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 414, 415, 416; *Bradford* v. *Bank*, 13 How. 56, 69, 70; *Walden* v. *Bodley*, 14 Pet. 156, 164; *Moran* v. *Hagerman*, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial *de novo* the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is the appellant so conclusively

estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 40 Fed. 476, 477; *Burke* v. *Davis*, 81 Fed. 907, 910, 26 C. C. A. 675, 678; *Haymond* v. *Murphy*, 64 S. E. (W. V.) 855, 857; *Hayes* v. *Hammond*, 44 N. E. (Ill.) 422, 423; *Hurd* v. *Goodrich*, 59 Ill. 450, 456; *Von Tobel* v. *Ostrander*, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000 par value of the stock of that company about $1,-

187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750.000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." *Northern Pacific Ry. Co.* v. *Boyd,* 177 Fed. 804, 101 C. C. A. 18; *Luedecke* v. *Des Moines Cabinet Co.,* 118 N. W. 456, 140 Ia. 223; *Hurd* v. *New York & Commercial Steam Laundry Co.,* 167 N. Y. 89, 60 N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred be-

fore the creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville etc. Ry. Co.,* 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the Belt Company on the same day to the appointment

of receivers of its property, its answer on October 19, 1901, admitting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership.

For what purpose did the Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Trust company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of the Belt Com-

pany, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its *cestuis que* trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained, that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plan of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid," 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1900. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

(3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of *nulla bona* to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adjudicated. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313, 325; *Ward* v. *Todd*, 103 U. S. 327, 329; *In re Blake*, 150 Fed. 279, 283, 80 C. C. A. 167, 173; *United States* v. *Standard Oil Company*, 152 Fed. 290, 296; *Campbell* v. *Golden Cycle Mining Co.*, 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was greater than that of the former

stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law, *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 878, 882, 884; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 456, 457; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is

founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. *Ervin* v. *Oregon Railway & Navigation Co.*, 27 Fed. 625, 633; *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the credtiors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that

the new bonds drew but three per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508; *Rankin* v. *Gardner*, 34 Atl. (N. J. Eq.) 935, 937; *Garrison* v. *Monaghan*, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property

on the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3 1/3 per cent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3 1/3 per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333; *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Luedecke* v. *Des Moines Cabinet Co.* 118 N. W. 457, 458; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this

position and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." *Clements* v. *Moore,* 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme court held that Moore was liable to the creditor Clements for that amount. By the same mark the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure the property of the Belt Company

and divert it from its creditors. *Central of Georgia Ry. Co.* v. *Paul,* 93 Fed. 883, 884; *Camden Interstate Ry. Co.* v. *Lee,* 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. *Railroad Company* v. *Soutter,* 80 U. S. 517, 522, 524; *Guckenheimer* v. *Angevine,* 81 N. Y. 394, 397; *Goble* v. *O'Connor,* 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; *Doherty* v. *Holliday,* 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; *Jones* v *Reeder,* 22 Ind. 111; *Swinford* v. *Rogers,* 23 Cal. 234, 237; *Mason* v. *Pierron,* 34 N. W. (Wis.) 921, 925; *Blair* v. *Smith,* 15 N. E. (Ind.) 817, 819, 820; *Williamson* v. *Williams,* 11 Lea 355; *Murtha* v. *Curley,* 90 N. Y. 372; *Post* v. *Stiger,* 29 N. J. Eq. 554, 561; *Chamberlin* v. *Jones,* 16 N. E. (Ind.) 178, 179; *Muskegon Valley Furniture Co* v. *Phillips,* 21 So. (Ala.) 822, 823; *Coale* v.

Moline Plow Co., 25 N. E. (Ill.) 1016, 1018; *Dilworth* v. *Curtz*, 29 N. E. (Ill.) 861, 864; *Hulley* v. *Chedic*, 36 Pac. 783, 786; *Morrell* v. *Miller*, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoevr against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing," (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to

execute a plan, which it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. *Cole* v. *German Savings & Loan Co.*, 124 Fed. 113, 119, 59 C. C. A. 593, 599; *Little Rock & M. R. Co.* v. *Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650; *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 247; *American Bridge Co.* v. *Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (a) the placing of the properties of the Belt Company, the

Gulf Company and the Dock Company under one corporate ownership, management and control, "(b) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization, consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * * any holder of any claims whatsoever against the said companies, * * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the *cestui que* trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contracts. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his benefit the property, money

or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee

to adjust or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stocks and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company, the agent of the Southern Company, which held 97 per cent of its stock, recovered a judgment and obtained a return of *nulla bona* to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust

Company to enjoin the latter company from selling its collateral and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. This issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forch its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the

Belt Company by the Southern Company and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1900, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 17, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the prop-

erty of the Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the state court to stay the

proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim in a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment. November

20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in *pais* are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; *Illinois Trust & Sav. Bank* v. *City of Arkansas City*, 76 Fed. 271, 293; 22 C. C. A. 171, 193; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 396, 397; *New York Life Ins. Co.* v. *McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presentel its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it would not press it

for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that company, and the answers of the Belt Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern

Company nor any of its bondholders or stockholders were without equal means of knowledge nor without notice under the law that the transfer of the property of the Belt Company to the Southern Company without offering to pay or paying to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from the date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the other holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by

the wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

(6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Southern Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Southern Company is entitled. *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142

U. S. 396, 413-416; *Hardin* v. *Boyd,* 113 U. S. 756; *Clark* v. *Clark,* 62 N. H. 267, 272; *Trimble* v. *Bank,* 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. *Bradford* v. *Union Bank of Tennessee,* 13 How. 56, 68, 69; *Walden* v. *Bodley,* 14 Pet. 156, 164; *Moran* v. *Hagerman,* 64 Fed. 499, 503, 504; *Wyatt* v. *Sweet,* 12 N. W. (Mich.) 692, 693. In *Walden* v. *Bodley,* 14 Pet. at page 164, the Supreme Court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them, and having jurisdiction of the main points they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorney's fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the

main decree, to render a further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal, 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal, 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, should adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $19,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right, to the extent necessary

to pay that debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of the 1120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right, title, claim and equity of the Southern Company therein, that in case the Southern Company fails to pay its debts to the Trust Company by a day to be named by the court in the decree, the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, or such part thereof as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto, that on the demand of the master the Southern Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the former decree be reversed and the case be remanded to the district court for further procedings in accord with the views expressed in this opinion.

Filed December 2, 1913.

A true copy.

Attest:

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.
[Seal]